

**This volume was donated to LLMC  
to enrich its on-line offerings and  
for purposes of long-term preservation by**

**Northwestern University School of Law**

# THE FEDERAL REPORTER.

VOL. 26.

---

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

---

FEBRUARY—APRIL, 1886.

---

SAINT PAUL:  
WEST PUBLISHING COMPANY.  
1886.



**COPYRIGHT, 1886,  
BY  
WEST PUBLISHING COMPANY.**

JUDGES  
OF THE  
CIRCUIT AND DISTRICT COURTS  
OF THE  
UNITED STATES.

---

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.  
HON. LE BARON B. COLT, CIRCUIT JUDGE.  
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.  
HON. DANIEL CLARK, DISTRICT JUDGE, NEW HAMPSHIRE.  
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.  
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.  
HON. WILLIAM J. WALLACE, CIRCUIT JUDGE.  
HON. NATHANIEL SHIPMAN, DISTRICT JUDGE, CONNECTICUT.  
HON. A. C. COXE, DISTRICT JUDGE, N. D. NEW YORK.  
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.  
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.  
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

THIRD CIRCUIT.

HON. JOSEPH P. BRADLEY, CIRCUIT JUSTICE.  
HON. WILLIAM McKENNAN, CIRCUIT JUDGE.  
HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.  
HON. JOHN T. NIXON, DISTRICT JUDGE, NEW JERSEY.  
HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.  
HON. MARCUS W. ACHESON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

## FOURTH CIRCUIT.

HON. MORRISON R. WAITE, CIRCUIT JUSTICE.  
HON. HUGH L. BOND, CIRCUIT JUDGE.  
HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.  
HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.  
HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.  
HON. GEORGE S. BRYAN, DISTRICT JUDGE, SOUTH CAROLINA.  
HON. R. W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.  
HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.  
HON. JOHN J. JACKSON, DISTRICT JUDGE, WEST VIRGINIA.

## FIFTH CIRCUIT.

HON. WILLIAM B. WOODS, CIRCUIT JUSTICE.  
HON. DON A. PARDEE, CIRCUIT JUDGE.  
HON. JOHN BRUCE, DISTRICT JUDGE, S., M., AND N. D. ALABAMA.  
HON. THOMAS SETTLE, DISTRICT JUDGE, N. D. FLORIDA.  
HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.  
HON. H. K. McCAY, DISTRICT JUDGE, N. D. GEORGIA.  
HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.  
HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.  
HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.  
HON. ROBERT A. HILL, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.  
HON. C. B. SABIN, DISTRICT JUDGE, E. D. TEXAS.  
HON. A. P. McCORMICK, DISTRICT JUDGE, N. D. TEXAS.  
HON. E. B. TURNER, DISTRICT JUDGE, W. D. TEXAS.

## SIXTH CIRCUIT.

HON. STANLEY MATTHEWS, CIRCUIT JUSTICE.  
HON. JOHN BAXTER, CIRCUIT JUDGE.<sup>1</sup>  
HON. H. E. JACKSON, CIRCUIT JUDGE.<sup>2</sup>  
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.  
HON. HENRY B. BROWN, DISTRICT JUDGE, E. D. MICHIGAN.  
HON. SOLOMON L. WITHEY, DISTRICT JUDGE, W. D. MICHIGAN.<sup>3</sup>  
HON. MARTIN WELKER, DISTRICT JUDGE, N. D. OHIO.  
HON. G. R. SAGE, DISTRICT JUDGE, S. D. OHIO.

<sup>1</sup> Deceased.

<sup>2</sup> Appointed to fill vacancy occasioned by Judge BAXTER's death.

<sup>3</sup> Deceased.

## CIRCUIT AND DISTRICT COURTS.

v

HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.

HON. E. S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

## SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.

HON. WALTER Q. GRESHAM, CIRCUIT JUDGE.

HON. HENRY W. BLODGETT, DISTRICT JUDGE, N. D. ILLINOIS.

HON. SAMUEL H. TREAT, DISTRICT JUDGE, S. D. ILLINOIS

HON. WILLIAM A. WOODS, DISTRICT JUDGE, INDIANA.

HON. CHARLES E. DYER, DISTRICT JUDGE, E. D. WISCONSIN.

HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN

## EIGHTH CIRCUIT.

HON. SAMUEL F. MILLER, CIRCUIT JUSTICE.

HON. DAVID J. BREWER, CIRCUIT JUDGE.

HON. HENRY C. CALDWELL, DISTRICT JUDGE, E. D. ARKANSAS.

HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.

HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.

HON. O. P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.

HON. JAMES M. LOVE, DISTRICT JUDGE, S. D. IOWA.

HON. C. G. FOSTER, DISTRICT JUDGE, KANSAS.

HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA

HON. SAMUEL TREAT, DISTRICT JUDGE, E. D. MISSOURI.

HON. ARNOLD KREKEL, DISTRICT JUDGE, W. D. MISSOURI

HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.

## NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.

HON. LORENZO SAWYER, CIRCUIT JUDGE.

HON. OGDEN HOFFMAN, DISTRICT JUDGE, CALIFORNIA

HON. GEORGE M. SABIN, DISTRICT JUDGE, NEVADA.

HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON

\*



# CASES REPORTED.

	Page		Page
Abercorn, The.....	877	Berkshire Nat. Bank, Yale Lock	
Acer, Canada Shipping Co. v.....	874	Manuf'g Co. v.....	104
Adams v. Bridgewater Iron Co.....	324	Beuttel v. Chicago, M. & St. P. Ry.	
Adams, The Z. L.....	655	Co.....	50
Adams & W. Manuf'g Co. v. Excel-		Beyer, Travers v.....	450
sior Oil-stove Manuf'g Co.....	270	Bird, Haight v.....	539
Adams & W. Manuf'g Co. v. Rath-		Birdseye v. Heilner.....	147
bone.....	262	Blair v. Walker.....	73
Agnes Barton, The.....	542	Blue Ridge Clay & Retort Co. v.	
Agnes Barton, The, McGee v.....	542	Floyd-Jones.....	817
Ah Lit, Ex parte.....	512	Bogart v. Hinds.....	149
Alabama, The.....	866	Bohanan v. Giles.....	204
Alabama, The, Hicks v.....	866	Boland v. Thompson.....	633
Alabastine Co. v. Richardson.....	620	Bond, Charleston Fruit Co. v.....	18
Albany Steam-trap Co. v. Felt-		Borough of Towanda, Wiley v.....	594
housen.....	818	Boston Marine Ins. Co., Richelieu &	
American Tube-works v. Bridge-		O. Nav. Co. v.....	596
water Iron Co.....	324	Botsford, Law v.....	651
American Tube-works v. Bridge-		Bradley, State v.....	289
water Iron Co.....	334	Brainard, Pollock v.....	732
American Zylonite Co., Celluloid		Bridgewater Iron Co., Adams v....	324
Manuf'g Co. v.....	692	Bridgewater Iron Co., American	
Amoskeag Nat. Bank, Whittemore v.	819	Tube-works v.....	324
Anheuser-Busch Brewing Ass'n v.		Bridgewater Iron Co., American	
Clarke.....	410	Tube-works v.....	334
Armistead, Webb v.....	70	Brighton Rancho Co., United States	
Arnheim v. Finster.....	277	v.....	218
Aron v. Manhattan Ry. Co.....	314	Broadway & Seventh Ave. R. Co.,	
A. R. Weeks, The, v. The Ephrussi	654	Railway Register Manuf'g Co. v.	522
A. R. Weeks, The, The Ephrussi v.	654	Brooks v. Hanover Nat. Bank.....	301
Ashton Valve Co., Consolidated		Brown v. The C. P. Raymond.....	281
Safety Valve Co. v., (two cases),..	319	Buckingham v. Porter.....	759
Atchison Savings Bank v. Templar.	580	Bunker v. Stevens.....	245
Atchison Savings Bank, Templar v.	580	Bybee v. Oregon & C. Ry. Co.....	586
Atlanta, The City of.....	456		
Aubrey, In re.....	848	Cambria Iron Co. v. Laclede Wire	
Austin v. The Ella B.....	111	& Fence Co.....	420
		Canada Shipping Co. v. Acer.....	874
Babcock v. Northern Pac. R. Co...	756	Carrigan v. Massachusetts Ben.	
Bailey, Robinson v.....	219	Ass'n.....	230
Baker, Law v.....	164	Carson v. The Mary Lord.....	862
Baltimore & Ohio Tel. Co., West-		Cary v. Domestic Spring-bed Co....	38
ern Union Tel. Co. v.....	55	Celluloid Manuf'g Co. v. American	
Baltimore & O. R. Co., Peake v....	495	Zylonite Co.....	692
Barlow, United States v.....	903	Celluloid Manuf'g Co. v. Tower...	451
Batchelor v. Kirkbride.....	899	Central City Soap Co., O'Rourke v.	576
Baumgarten, Forschner v.....	858	Central Pac. R. Co., United States v.	479
Bear, Connecticut Mut. Life Ins.		Central Park, N. & E. R. R. Co.,	
Co. v.....	582	Railway Register Manuf'g Co. v.	522
Belfield, Watson v.....	536	Central Trust Co. v. Wabash, St. L.	
Benedict, Knapp v.....	627	& P. Ry. Co.....	3
Bensley v. Northwestern Horse-nail		Central Trust Co. v. Wabash, St. L.	
Co.....	250	& P. Ry. Co.....	11
v.26—FED.		(vii)	

	Page		Page
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.....	12	De Belaunzaran, Eisenhauer v.....	784
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.....	74	De Belaunzaran, Hatton v.....	780
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.....	896	Dederick v. Whitman Agr. Co.....	755
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.....	897	Dederick v. Whitman Agr. Co.....	763
Charleston Fruit Co. v. Bond.....	18	De France v. Johnson.....	891
Chicago, B. & N. R. Co., Illinois Cent. R. Co. v.....	477	Dentz, The George H.....	40
Chicago City Ry. Co., Van de Ven-ter v.....	32	Denver & R. G. Ry. Co., Howard v.....	837
Chicago, M. & St. P. Ry. Co., Beut-tel v.....	50	Dickson, Gorrell v.....	454
Chicago, M. & St. P. R. Co., Morris v., (three cases,).....	22	Director, The.....	708
Chicago & P. R. Co. v. Third Nat. Bank of Chicago.....	820	Dixon v. The Surrey.....	791
Christ v. Schell.....	138	D. J. Foley, The.....	456
Citizens' Nat. Bank v. Wert.....	294	Dolliver, Goodnow v.....	469
City of Atlanta, The.....	456	Domestic Spring-bed Co., Cary v....	38
City of Chicago, Lehigh Valley Coal Co. v.....	415	Doris, The.....	860
City of Concord, Norton v.....	679	Dreyfus, Weiler v.....	824
City of Dover, Norton v.....	679	Drummond v. Venable.....	243
City of Manchester, Norton v.....	679	Dundee Mortgage & Trust Invest-ment Co. v. Cooper.....	665
City of Nashua, Norton v.....	679	Dundee Mortg. & T. Inv. Co., Hughes v.....	831
City of New Bedford, Shaw Relief-valve Co. v.....	331	Dundee Mortg. & T. Inv. Co., Hughes v., (two cases,).....	837
City of Philadelphia, Etheridge v.....	43	East River Ferry Co., In re.....	766
City of Portsmouth, Norton v.....	679	Edna B. King, The.....	158
City of Springfield, The.....	158	Eisenhauer v. De Belaunzaran.....	784
City of Springfield, The, Studwell v.....	158	Ella B., The.....	111
City of Waterloo, Trescott v.....	592	Ella B., The, Austin v.....	111
Clarke, Anheuser-Busch Brewing Ass'n v.....	410	Elliott, Phelps v.....	881
Clarkhuff v. Wisconsin, I. & N. R. Co.....	465	Elliott Pneumatic Door-check Co., Norton Door-check & Spring Co. v.....	320
Clear v. Fox.....	90	Emken, Marchand v.....	629
Cline, United States v.....	515	Ephrussi, The, v. The A. R. Weeks.....	654
Colby, Tobey Furniture Co. v.....	100	Ephrussi, The, The A. R. Weeks v.....	654
Connecticut Mut. Life Ins. Co. v. Bear.....	582	Etheridge v. City of Philadelphia... ..	43
Connecticut & P. R. R. Co., Hendee v.....	677	Evans v. North-side Bridge Co.....	718
Consolidated Safety Valve Co. v. Ashton Valve Co., (two cases,)...	319	Everett v. Hutchinson.....	531
Continental Ins. Co., Craig v.....	798	Everett, Hutchinson v.....	531
Cooper, Dundee Mortgage & Trust Investment Co. v.....	665	Excelsior Oil-stove Manuf'g Co., Adams & W. Manuf'g Co. v.....	270
Copeland, Tubular Rivet Co. v.....	706	Falls of Neuse Manuf'g Co. v. Geor-gia Home Ins. Co.....	1
Cosgrove, United States v.....	908	Felthousen, Albany Steam-trap Co. v.....	318
C. P. Raymond, The.....	281	Finster, Arnheim v.....	277
C. P. Raymond, The, Brown v.....	281	Florsheim v. Schilling.....	256
Craig v. Continental Ins. Co.....	798	Floyd-Jones, Blue Ridge Clay & Re-tort Co. v.....	817
Crane v. Runey.....	15	Foley, The D. J.....	456
Crowley, Yick Wo v.....	207	Forschner v. Baumgarten.....	858
Cruikshank v. Fourth Nat. Bank..	584	Foster, Witters v.....	737
Cubley, Wilson v.....	156	Fourth Nat. Bank, Cruikshank v....	584
Cunningham v. Switzerland Marine Ins. Co.....	46	Fox, Clear v.....	90
Curtis v. Wortsman.....	36	Frankfort Whisky Process Co. v. Pepper.....	336
Curtner, United States v.....	296	Freund v. Yaegerman.....	812
		Friedman v. Israel.....	801
Davis, Royal Baking Powder Co. v.....	298	Gage v. Kellogg.....	242
		Gallagher v. The Young America..	174
		Gano, Lyddy v.....	177
		Garden City, The.....	766
		Gedney v. The Minnie.....	860

	Page		Page
Gelshenen v. Harris .....	680	Hutchinson v. Everett.....	531
Geneva, The.....	647	Hutchinson, Everett v.....	531
Geneva, The, Poor v.....	647		
George H. Dentz, The.....	40	Illinois Cent. R. Co. v. Chicago, B. &	
Georgia Home Ins. Co., Falls of		N. R. Co.....	477
Neuse Manuf'g Co. v.....	1	Impaneling and Instructing Grand	
Giles, Bohanan v.....	204	Jury, In re.....	749
Glenn v. Springs.....	494	Indianapolis R. M. Co. v. St. Louis,	
Goodnow v. Dolliver.....	469	F. S. & W. R. Co.....	140
Goodrich Transp. Co., In re.....	713	International Ry. Imp. Co., Hunter	
Gorrell v. Dickson.....	454	v.....	299
Gourden, Mayer v.....	742	Isaksson v. Williams.....	642
Grand Jury, In re Impaneling and		Israel, Friedman v.....	801
Instructing.....	749		
Greenhalgh, St. Paul, M. & M. R.		Jenkins v. Hannan.....	657
Co. v.....	563	Johnsen, Swift's Iron & Steel Works	
Greenleaf v. Worthington.....	803	v.....	828
Griswold v. Hazard.....	135	Johnson, De France v.....	891
Guillermo, The.....	921	Johnson, United States v.....	682
Guillermo, The, Post v.....	921	Johnston v. Straus.....	57
Gwalia's Cargo, The.....	919	Judd, Hammerschlag Manuf'g Co. v.	292
Haight v. Bird.....	539	Kellogg, Gage v.....	242
Haines v. Peck.....	625	Kelly, In re.....	852
Hammacher v. Wilson.....	239	Kendall, Holt v.....	622
Hammerschlag Manuf'g Co. v. Judd	292	King v. Neill.....	721
Hannan, Jenkins v.....	657	King, The Edna B.....	158
Hanover Nat. Bank, Brooks v.....	301	Kirk v. Milwaukee Dust Collector	
Harper v. Shoppell.....	519	Manuf'g Co.....	501
Harris, Gelshenen v.....	680	Kirkbride, Batchelor v.....	899
Hartford Machine Screw Co. v. Rey-		Knapp v. Benedict.....	627
nolds.....	528		
Hatton v. De Belaunzaran.....	780	Laclede Wire & Fence Co., Cambria	
Haynes, United States v.....	857	Iron Co. v.....	420
Hazard v. National Exch. Bank.....	94	Lafayette Hominy Mills, Hudnut v.....	636
Hazard, Griswold v.....	135	Lancaster v. Providence & S. S. S.	
Hearing, United States v.....	744	Co.....	233
Heilner, Birdseye v.....	147	Laughlin, Russell v.....	699
Heilner, United States v.....	80	Lauro v. The Mary Fraser.....	872
Helena, The, v. The Lord O'Neil.....	463	Law v. Baker.....	164
Helena, The, The Lord O'Neil v.....	463	Law v. Botsford.....	651
Hellyer, Ross v.....	413	Lehigh Valley Coal Co v. City of	
Hendee v. Connecticut & P. R. R. Co.	677	Chicago.....	415
Henry Sutton, The.....	923	Lepper, Perrin v.....	545
Hibbs, Ex parte.....	421	Libbey v. Mt. Washington Glass Co.	757
Hicks v. The Alabama.....	866	Loomer, Rheubottom v.....	698
Hill, Sharon v.....	337	Lord O'Neil, The, v. The Helena.....	463
Hill, Sharon v.....	722	Lord O'Neil, The, The Helena v.....	463
Hilton v. Otoe Co. Nat. Bank.....	202	Lotus No. 2, The.....	637
Hinds, Bogart v.....	149	Lotus No. 2, The, Walker v.....	637
Hintermeister, Williams v.....	889	Luckenback, In re The.....	870
Hoboken Land & Imp. Co. v. The		Lyddy v. Gano.....	177
Pavonia.....	106		
Holt v. Kendall.....	622	Macheca v. United States.....	845
Hook v. The Venture.....	285	Mandel v. Spalding.....	609
Hopkins, United States v.....	443	Manhattan Fire Ins. Co., True v.....	83
Howard v. Denver & R. G. Ry. Co.	837	Manhattan Ry. Co., Aron v.....	814
Hoyt v. Slocum.....	329	Manson v. New York, N. H. & H. R.	
Hudnut v. Lafayette Hominy Mills.	636	Co.....	923
Hughes v. Dundee Mortg. & T. Inv.		Marchand v. Emken.....	629
Co.....	831	Marcussen v. The Mary Fraser.....	872
Hughes v. Dundee Mortg. & T. Inv.		Mary Fraser, The.....	872
Co., (two cases,).....	837	Mary Fraser, The, Lauro v.....	872
Hunt, In re.....	739	Mary Fraser, The, Marcussen v.....	872
Hunter v. International Ry. Imp. Co.	299	Mary Lord, The.....	862



	Page		Page
Mary Lord, The, Carson v.....	862	Norton Door-check & Spring Co. v.	
Massachusetts Ben. Ass'n, Carrigan		Elliott Pneumatic Door-check Co..	820
v.....	230		
Mater, Patterson v.....	31	Ogborn, Tucker v.....	272
Maxwell Land Grant Co., United		Ohio Steel Barb Fence Co. v. Wash-	
States v.....	118	burn & Moen Manuf'g Co.....	702
Mayer v. Gourden.....	742	Oliver, Thurber v.....	224
McClean, In re Estate of.....	49	Oregon & C. Ry. Co., Bybee v.....	586
McGee v. The Agnes Barton.....	542	O'Rourke v. Central City Soap Co.	576
McGuire v. Winslow.....	304	Otoe Co. Nat. Bank, Hilton v.....	202
McRoberts, Steam-gauge & Lantern			
Co. v.....	765	Patterson v. Mater.....	31
Means v. Rees.....	210	Patterson, United States v.....	509
Mehrhoff v. Mehrhoff.....	13	Pavonia, The.....	106
Miller, United States v.....	95	Pavonia, The, Hoboken Land &	
Mills, Yoder v.....	273	Imp. Co. v.....	106
Milwaukee Dust Collector Manuf'g		Peake v. Baltimore & O. R. Co....	495
Co., Kirk v.....	501	Peck, Haines v.....	625
Minnie, The.....	860	Pennsylvania R. Co. v. The Ply-	
Minnie, The, Gedney v.....	860	mouth Rock.....	40
Minor, United States v.....	672	Pepper, Frankfort Whisky Process	
Missouri, K. & T. Ry. Co. v. Union		Co. v.....	336
Trust Co. of N. Y.....	485	Perrin v. Lepper.....	545
Missouri, K. & T. Ry. Co., Union		Phelps v. Elliott.....	881
Trust Co. of N. Y. v.....	485	Phelps, St. Paul, M. & M. Ry. Co. v.	569
Mitchell, United States v.....	607	Phillips v. Risser.....	308
M. J. Murphy Furnishing Goods Co.,		Phipps v. Yost.....	447
Sprague-Brimmer Manuf'g Co. v.	572	Phoenix Caster Co. v. Spiegel.....	272
Modoc, The.....	718	Piper v. Shedd.....	151
Montgomery, Nickerson v.....	655	Pittsburgh & L. E. R. Co., United	
Morris v. Chicago, M. & St. P. R.		States v.....	113
Co., (three cases,).....	22	Plymouth, The.....	879
Morris, Wheeler v.....	918	Plymouth, The, Neal v.....	879
Mt. Washington Glass Co., Libbey v.	757	Plymouth Rock, The.....	40
Mullen v. Wine.....	206	Plymouth Rock, The, Pennsylvania	
		R. Co. v.....	40
National Bureau of Engraving &		Pollock v. Brainard.....	732
Manuf'g Co. v. The New Orleans	44	Poor v. The Geneva.....	647
National Exch. Bank, Hazard v....	94	Porter, Buckingham v.....	759
Neal v. The Plymouth.....	879	Post v. T. C. Richards Hardware	
Neill, King v.....	721	Co.....	618
Neumann, Roemer v.....	102	Post v. The Guillermo.....	921
Neumann, Roemer v.....	332	Preston v. Smith.....	884
New Castle N. Ry. Co. v. Simpson.	133	Procter v. Spalding.....	610
New Orleans, The.....	44	Providence & S. S. S. Co., Lancas-	
New Orleans, The, National Bureau		ter v.....	233
of Engraving & Manuf'g Co. v..	44		
New York, N. H. & H. R. Co., Man-		Rahn v. Singer Manuf'g Co.....	912
son v.....	923	Railway Register Manuf'g Co. v.	
Nickerson v. Montgomery.....	655	Broadway & Seventh Ave. R. Co.	522
Ninety-five Thousand Feet of Lum-		Railway Register Manuf'g Co. v.	
ber, Wall v.....	716	Central Park, N. & E. R. R. Co....	522
Northern Pac. R. Co. v. St. Paul, M.		Railway Register Manuf'g Co. v.	
& M. Ry. Co.....	551	North Hudson Co. R. Co.....	411
Northern Pac. R. Co., Babcock v..	756	Rathbone, Adams & W. Manuf'g	
Nor. h Hudson Co. R. Co., Railway		Co. v.....	262
Register Manuf'g Co. v.....	411	Raymond, The C. P.....	281
North-side Bridge Co., Evans v....	718	Rees, Means v.....	210
Northwestern Horse-nail Co., Bens-		Reynolds, Hartford Machine Screw	
ley v.....	250	Co. v.....	528
Norton v. City of Concord.....	679	Rheubottom v. Loomer.....	698
Norton v. City of Dover.....	679	Richardson, Alabastine Co. v.....	620
Norton v. City of Manchester.....	679	Richelieu & O. Nav. Co. v. Boston	
Norton v. City of Nashua.....	679	Marine Ins. Co.....	596
Norton v. City of Portsmouth.....	679	Risser, Phillips v.....	308

	Page		Page
Roanoke, N. & B. S. B. Co., Royster v. ....	492	Switzerland Marine Ins. Co., Cunningham v. ....	46
Robinson v. Bailey .....	219	T. C. Richards Hardware Co., Post v. ....	618
Roemer v. Neumann.....	102	Templar v. Atchison Savings Bank.	580
Roemer v. Neumann.....	332	Templar, Atchison Savings Bank v.	580
Ross v. Hellyer.....	413	Third Nat. Bank of Chicago, Chicago & P. R. Co. v. ....	820
Royal Baking Powder Co. v. Davis.	293	Thompson, Boland v. ....	633
Royster v. Roanoke, N. & B. S. B. Co. ....	492	Thornton, Wooster v. ....	274
Runey, Crane v. ....	15	Thurber v. Oliver.....	224
Russell v. Laughlin.....	699	Tie Loy, In re.....	611
St. Louis, F. S. & W. R. Co., Indianapolis R. M. Co. v. ....	140	Tobey Furniture Co. v. Colby.....	100
St. Paul, M. & M. R. Co. v. Greenhalgh.....	563	Tower, Celluloid Manuf'g Co. v. ....	451
St. Paul, M. & M. Ry. Co. v. Phelps.	569	Township of Clarendon, Young v. ....	805
St. Paul, M. & M. R. Co. v. Wenzel.	563	Travers v. Beyer.....	450
St. Paul, M. & M. Ry. Co., Northern Pac. R. Co. v. ....	551	Trescott v. City of Waterloo.....	592
Sayre, Scott Manuf'g Co. v. ....	153	True v. Manhattan Fire Ins. Co. ....	83
Schell, Christ v. ....	133	Tubular Rivet Co. v. Copeland. ....	706
Schilling, Florsheim v. ....	256	Tucker v. Ogborn.....	272
Schumacher v. Schwencke.....	818	Union Cotton Compress Co. of Galveston v. The Wivanhoe.....	927
Schwencke, Schumacher v. ....	818	Union Trust Co. of N. Y. v. Missouri, K. & T. Ry. Co. ....	485
Scott Manuf'g Co. v. Sayre.....	153	Union Trust Co. of N. Y., Missouri, K. & T. Ry. Co. v. ....	485
Searcey, United States v. ....	435	United States v. Barlow.....	903
Sharon v. Hill.....	337	United States v. Brighton Rancho Co. ....	218
Sharon v. Hill.....	722	United States v. Central Pac. R. Co. ....	479
Shaw Relief-valve Co. v. City of New Bedford.....	331	United States v. Cline.....	515
Shedd, Piper v. ....	151	United States v. Cosgrove.....	908
Shoppell, Harper v. ....	519	United States v. Curtner.....	296
Simpson, New Castle N. Ry Co. v. ....	133	United States v. Haynes.....	857
Singer Manuf'g Co., Rahn v. ....	912	United States v. Hearing.....	744
Sinnott, United States v. ....	84	United States v. Heilner.....	80
Sinnott, United States v. ....	89	United States v. Hopkins.....	443
Slocum, Hoyt v. ....	329	United States v. Johnson.....	682
Smith, Preston v. ....	884	United States v. Maxwell Land Grant Co. ....	118
Spalding, Mandel v. ....	609	United States v. Miller.....	95
Spalding, Procter v. ....	610	United States v. Minor.....	672
Spalding, Wolff v. ....	609	United States v. Mitchell.....	607
Sperry v. Springfield F. & M. Ins. Co. ....	234	United States v. Patterson.....	509
Sperry, United States Mortgage Co. v. ....	727	United States v. Pittsburgh & L. E. R. Co. ....	113
Spiegel, Phoenix Caster Co. v. ....	272	United States v. Searcey.....	435
Sprague-Brimmer Manuf'g Co. v. M. J. Murphy Furnishing Goods Co.	572	United States v. Sinnott.....	84
Springfield F. & M. Ins. Co., Sperry v. ....	234	United States v. Sinnott.....	89
Springs, Glenn v. ....	494	United States v. Warner.....	616
State v. Bradley.....	289	United States v. Williamson.....	690
State v. Walruff.....	178	United States, Macheca v. ....	845
Steam-gauge & Lantern Co. v. McRoberts.....	765	United States Mortgage Co. v. Sperry	727
Stevens, Bunker v. ....	245	Van de Venter v. Chicago City Ry. Co. ....	32
Stockton Laundry Case, The.....	611	Venable, Drummond v. ....	243
Straus, Johnston v. ....	57	Venture, The.....	285
Studwell v. The City of Springfield.	158	Venture, The, Hook v. ....	285
Surrey, The.....	791	Vessel Owners' Towing Co., In re..	169
Surrey, The, Dixon v. ....	791	Vessel Owners' Towing Co., In re..	172
Sutton, The Henry.....	923	Vetterlein, In re.....	145
Swift's Iron & Steel Works v. Johnson.....	828		

	Page		Page
Wabash, St. L. & P. Ry. Co., Central Trust Co. v.....	3	Wiley v. Borough of Towanda.....	594
Wabash, St. L. & P. Ry. Co., Central Trust Co. v.....	11	Williams v. Hintermeister.....	889
Wabash, St. L. & P. Ry. Co., Central Trust Co. v.....	12	Williams, Isaksson v.....	642
Wabash, St. L. & P. Ry. Co., Central Trust Co. v.....	74	Williamson, United States v.....	690
Wabash, St. L. & P. Ry. Co., Central Trust Co. v.....	896	Wilson v. Cubley.....	156
Wabash, St. L. & P. Ry. Co., Central Trust Co. v.....	897	Wilson, Hammacher v.....	239
Walker v. The Lotus No. 2.....	687	Wine, Mullen v.....	206
Walker, Blair v.....	73	Winslow, McGuire v.....	304
Wall v. Ninety-five Thousand Feet of Lumber.....	716	Wisconsin, I. & N. R. Co., Clark-huff v.....	465
Walruff, State v.....	178	Witters v. Foster.....	737
Warner, United States v.....	616	Wivanhoe, The.....	927
Washburn & Moen Manuf'g Co., Ohio Steel Barb Fence Co. v.....	702	Wivanhoe, The, Union Cotton Com-press Co. of Galveston v.....	927
Watson v. Belfield.....	536	Wo Lee, In re.....	471
Webb v. Armistead.....	70	Wolff v. Spalding.....	609
Weiler v. Dreyfus.....	824	Wooster v. Thoraton.....	274
Wenzel, St. Paul, M. & M. R. Co. v.....	563	Worthington, Greenleaf v.....	303
Wert, Citizens' Nat. Bank v.....	294	Wortsman, Curtis v.....	86
Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.....	55	Yaegerman, Freund v.....	812
Wheeler v. Morris.....	918	Yale Lock Manuf'g Co. v. Berkshire Nat. Bank.....	104
Whitman Agr. Co., Dederick v.....	755	Yick Wo v. Crowley.....	207
Whitman Agr. Co., Dederick v.....	763	Yoder v. Mills.....	273
Whittemore v. Amoskeag Nat. Bank	819	Yost, Phipps v.....	447
		Young v. Township of Clarendon..	805
		Young America, The.....	174
		Young America, The, Gallagher v..	174
		Z. L. Adams, The.....	655

# CASES REPORTED.

## ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

### FIRST CIRCUIT.

#### CIRCUIT COURT, D. MAINE.

Neal v. The Plymouth.....	879
Plymouth, The.....	879
Russell v. Laughlin.....	699

#### DISTRICT COURT, D. MAINE.

Carson v. The Mary Lord.....	862
Mary Lord, The.....	862

#### CIRCUIT COURT, D. MASSACHUSETTS.

Adams v. Bridgewater Iron Co.....	324
Alabastine Co. v. Richardson.....	620
American Tube-works v. Bridge-	
water Iron Co.....	324
American Tube-works v. Bridge-	
water Iron Co.....	334
Celluloid Manuf'g Co. v. Tower...	451
Consolidated Safety-valve Co. v.	
Ashton Valve Co., (two cases)... ..	319
Greenleaf v. Worthington.....	303
Hammacher v. Wilson.....	239
Hammerschlag Manuf'g Co. v. Judd	292
Hoyt v. Slocum.....	329
Libbey v. Mt. Washington Glass Co.	757
Norton Door-check & Spring Co. v.	
Elliott Pneumatic Door-check Co..	320
Shaw Relief-valve Co. v. City of	
New Bedford.....	331
Tubular Rivet Co. v. Copeland. ...	706
United States v. Haynes.....	857
Yale Lock Manuf'g Co. v. Berkshire	
Nat. Bank.....	104

#### DISTRICT COURT, D. MASSACHUSETTS.

Gwalia's Cargo, The.....	919
--------------------------	-----

#### CIRCUIT COURT, D. NEW HAMPSHIRE.

Norton v. City of Concord.....	679
--------------------------------	-----

Norton v. City of Dover.....	679
Norton v. City of Manchester.....	679
Norton v. City of Nashua.....	679
Norton v. City of Portsmouth.....	679
Whittemore v. Amoskeag Nat. Bank	819

#### CIRCUIT COURT, D. RHODE ISLAND.

Griswold v. Hazard.....	135
Hazard v. National Exch. Bank....	94

### SECOND CIRCUIT.

#### CIRCUIT COURT, D. CONNECTICUT.

Hartford Machine Screw Co. v. Rey-	
nolds.....	528
Knapp v. Benedict.....	627
Post v. T. C. Richards Hardware	
Co.....	618
Rheubottom v. Loomer.....	698

#### DISTRICT COURT, D. CONNECTICUT.

Doris, The.....	860
Gedney v. The Minnie.....	860
Henry Sutton, The.....	928
Manson v. New York, N. H. & H. R.	
Co.....	928
Minnie, The.....	860

#### CIRCUIT COURT, N. D. NEW YORK.

Albany Steam-trap Co. v. Felt-	
housen.....	319
Gage v. Kellogg.....	242
McGuire v. Winslow.....	804
Travers v. Beyer.....	450

#### CIRCUIT COURT, S. D. NEW YORK.

Arnheim v. Finster.....	277
Aron v. Manhattan Ry. Co..	814
(xiii)	

	Page		Page
Birdseye v. Heilner.....	147	Marcussen v. The Mary Fraser.....	872
Bogart v. Hinds.....	149	Mary Fraser, The.....	872
Boland v. Thompson.....	633	Nickerson v. Montgomery.....	655
Brooks v. Hanover Nat. Bank.....	301	Pennsylvania R. Co. v. The Ply-	
Celluloid Manuf'g Co. v. American		mouth Rock.....	40
Zylonite Co.....	692	Plymouth Rock, The.....	40
Christ v. Schell.....	138	Post v. The Guillermo.....	921
Cruikshank v. Fourth Nat. Bank..	584	Studwell v. The City of Springfield.	158
Forschner v. Baumgarten.....	858	Surrey, The.....	791
Frankfort Whisky Process Co. v.		United States v. Miller.....	95
Pepper.....	936	Vetterlein, In re.....	145
Haines v. Peck.....	625	Wall v. Ninety-five Thousand Feet	
Harper v. Shoppell.....	519	of Lumber.....	716
Hoboken Land & Imp. Co. v. The		Young America, The.....	174
Pavonia.....	106	Z. L. Adams, The.....	655
Hunter v. International Ry. Imp. Co.	299		
Lancaster v. Providence & S. S. S.			
Co.....	233		
Lyddy v. Gano.....	177		
Marchand v. Emken.....	629		
Pavonia, The.....	106		
Phelps v. Elliott.....	881		
Phipps v. Yost.....	447		
Railway Register Manuf'g Co. v.			
Broadway & Seventh Ave. R. Co.	522		
Railway Register Manuf'g Co. v.			
Central Park, N. & E. R. R. Co....	522		
Roemer v. Neumann.....	102		
Roemer v. Neumann.....	332		
Schumacher v. Schwencke.....	818		
United States v. Warner.....	616		
Western Union Tel. Co. v. Baltimore			
& Ohio Tel. Co.....	55		
Wooster v. Thornton.....	274		
DISTRICT COURT, N. D. NEW YORK.			
Austin v. The Ella B.....	111		
Ella B., The.....	111		
United States v. Mitchell.....	607		
DISTRICT COURT, S. D. NEW YORK.			
Brown v. The C. P. Raymond.....	281		
Canada Shipping Co. v. Acer.....	874		
City of Atlanta, The.....	456		
City of Springfield, The.....	158		
C. P. Raymond, The.....	281		
Cunningham v. Switzerland Marine			
Ins. Co.....	46		
D. J. Foley, The.....	456		
Dixon v. The Surrey.....	791		
East River Ferry Co., In re.....	766		
Edna B. King, The.....	158		
Eisenhauer v. De Belaunzaran.....	784		
Gallagher v. The Young America..	174		
Garden City, The.....	766		
George H. Dentz, The.....	40		
Guillermo, The.....	921		
Haight v. Bird.....	539		
Hatton v. De Belaunzaran.....	780		
Isaksson v. Williams.....	642		
Lauro v. The Mary Fraser.....	872		
Luckenback, In re The.....	870		
		CIRCUIT COURT, D. VERMONT.	
		Hendee v. Connecticut & P. R. R. Co.	677
		Witters v. Foster.....	737
		THIRD CIRCUIT.	
		CIRCUIT COURT, D. NEW JERSEY.	
		Batchelor v. Kirkbride.....	899
		Bunker v. Stevens.....	245
		Cary v. Domestic Spring-bed Co....	38
		Railway Register Manuf'g Co. v.	
		North Hudson Co. R. Co.....	411
		Scott Manuf'g Co. v. Sayre.....	153
		Watson v. Belfield.....	536
		DISTRICT COURT, D. NEW JERSEY.	
		Hunt, In re.....	739
		CIRCUIT COURT, E. D. PENNSYLVANIA.	
		Carrigan v. Massachusetts Ben.	
		Ass n.....	280
		Helena, The, v. The Lord O'Neil...	463
		Lord O'Neil, The, v. The Helena...	463
		Yoder v. Mills.....	273
		CIRCUIT COURT, W. D. PENNSYLVANIA.	
		Gorrell v. Dickson.....	454
		McClellan, In re Estate of.....	49
		New Castle N. Ry. Co. v. Simpson.	133
		Wiley v. Borough of Towanda.....	504
		Williams v. Hintermeister.....	889
		DISTRICT COURT, E. D. PENNSYLVANIA.	
		A. R. Weeks, The, v. The Ephrussi	654
		Ephrussi, The, v. The A. R. Weeks.	554
		Etheridge v. City of Philadelphia...	42

# CASES REPORTED.

37

	Page
DISTRICT COURT, W. D. PENNSYLVANIA.	
Evans v. North-side Bridge Co....	718
Geneva, The.....	647
Hook v. The Venture.....	285
Modoc, The.....	718
Poor v. The Geneva.....	647
United States v. Pittsburgh & L. E. R. Co.....	113
Venture, The.....	285

## FOURTH CIRCUIT.

### CIRCUIT COURT, D. MARYLAND.

Anheuser-Busch Brewing Ass'n v. Clarke.....	410
Thurber v. Oliver.....	224

### CIRCUIT COURT, E. D. NORTH CAROLINA.

Connecticut Mut. Life Ins. Co., v. Bear.....	582
Royster v. Roanoke, N. & B. S. B. Co.	492

### CIRCUIT COURT, W. D. NORTH CAROLINA.

Falls of Neuse Manuf'g Co. v. Georgia Home Ins. Co.....	1
Glenn v. Springs.....	494

### DISTRICT COURT, W. D. NORTH CAROLINA.

United States v. Cline.....	515
United States v. Hopkins.....	448
United States v. Searcey.....	435

### CIRCUIT COURT, E. D. VIRGINIA.

Clear v. Fox.....	90
Johnston v. Straus.....	57
Webb v. Armistead.....	70

### DISTRICT COURT, E. D. VIRGINIA.

Agnes Barton, The.....	542
McGee v. The Agnes Barton.....	542
Union Cotton Compress Co. of Galveston v. The Wivanhoe.....	927
United States v. Williamson.....	690
Wivanhoe, The.....	927

## FIFTH CIRCUIT.

### DISTRICT COURT, S. D. ALABAMA.

Alabama, The.....	866
-------------------	-----

	Page
Hicks v. The Alabama.....	866
Lotus No. 2, The.....	637
Walker v. The Lotus No. 2.....	637

### CIRCUIT COURT, S. D. GEORGIA, E. D.

Charleston Fruit Co. v. Bond.....	18
Curtis v. Wortsman.....	36
King v. Neill.....	721
United States v. Johnson.....	682

### DISTRICT COURT, S. D. GEORGIA, E. D.

Mayer v. Gourden.....	742
-----------------------	-----

### CIRCUIT COURT, E. D. LOUISIANA.

Aubrey, In re.....	848
Friedman v. Israel.....	801
Machecha v. United States.....	845
National Bureau of Engraving & Manuf'g Co. v. The New Orleans	44
New Orleans, The.....	44
Swift's Iron & Steel Works v. Johnson.....	828
Weiler v. Dreyfus.....	824

## SIXTH CIRCUIT.

### CIRCUIT COURT, E. D. MICHIGAN.

Craig v. Continental Ins. Co.....	798
O'Rourke v. Central City Soap Co.	576
Perrin v. Lepper.....	545
Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.....	596
Royal Baking Powder Co. v. Davis.	293
Young v. Township of Clarendon..	805

### DISTRICT COURT, E. D. MICHIGAN.

Law v. Botsford.....	651
----------------------	-----

### CIRCUIT COURT, S. D. OHIO.

Peake v Baltimore & O. R. Co.....	495
-----------------------------------	-----

### CIRCUIT COURT, S. D. OHIO, W. D.

Jenkins v. Hannan.....	657
------------------------	-----

### CIRCUIT COURT, E. D. TENNESSEE, S. D.

Means v. Rees.....	210
--------------------	-----

### CIRCUIT COURT, W. D. TENNESSEE.

United States v. Patterson.....	509
---------------------------------	-----

**SEVENTH CIRCUIT.**

**CIRCUIT COURT, N. D. ILLINOIS.**

Adams & W. Manuf'g Co. v. Excel-	
sior Oil-stove Manuf'g Co.....	270
Adams & W. Manuf'g Co. v. Rath-	
bone.....	262
Bensley v. Northwestern Horse-nail	
Co.....	250
Chicago & P. R. Co. v. Third Nat.	
Bank of Chicago.....	820
Drummond v. Venable.....	243
Everett v. Hutchinson.....	531
Florsheim v. Schilling.....	256
Holt v. Kendall.....	622
Hutchinson v. Everett.....	531
Illinois Cent. R. Co. v. Chicago, B. &	
N. R. Co.....	477
Lehigh Valley Coal Co. v. City of	
Chicago.....	415
Mandel v. Spalding.....	609
Ohio Steel Barb Fence Co. v. Wash-	
burn & Moen Manuf'g Co.....	702
Piper v. Shedd.....	151
Procter v. Spalding.....	610
Steam-gauge & Lantern Co. v. Mc-	
Roberts.....	765
Tobey Furniture Co. v. Colby.....	100
United States Mortgage Co. v. Sperry	
Van de Venter v. Chicago City Ry.	
Co.....	32
Wilson v. Cubley.....	156
Wolff v. Spalding.....	609

## DISTRICT COURT, N. D. ILLINOIS.

Law v. Baker.....	164
Phillips v. Risser.....	308
Vessel Owners' Towing Co., In re..	169
Vessel Owners' Towing Co., In re..	172

CIRCUIT COURT, D. INDIANA.

Citizens' Nat. Bank v. Wert.....	294
Hudnut v. Lafayette Hominy Mills.....	636
Phoenix Caster Co. v. Spiegel.....	272
Tucker v. Ogborn.....	272
Wheeler v. Morris.....	918

CIRCUIT COURT, E. D. WISCONSIN.

Gelshenen v. Harris .....	680
Kirk v. Milwaukee Dust Collector Manuf'g Co.....	501

## DISTRICT COURT, E. D. WISCONSIN.

Goodrich Transp. Co., In re..... 713

**EIGHTH CIRCUIT.**

**CIRCUIT COURT, D. COLORADO.**

Howard v. Denver & R. G. Ry. Co.	887
Mullen v. Wine	206
Patterson v. Mater	31
Sperry v. Springfield F. & M. Ins. Co.	234
True v. Manhattan Fire Ins. Co.	83
United States v. Barlow	903
United States v. Maxwell Land Grant Co.	118

CIRCUIT COURT, N. D. IOWA.

Morris v. Chicago, M. & St. P. R. Co., (three cases),.....	22
---	----

CIRCUIT COURT, N. D. IOWA, C. D.

Goodnow v. Dolliver..... 469

CIRCUIT COURT, N. D. IOWA, E. D.

Beuttel v. Chicago, M. & St. P. Ry. Co. ....	50
Robinson v. Bailey .....	219
Trescott v. City of Waterloo.....	592

CIRCUIT COURT, S. D. IOWA.

Clarkhuff v. Wisconsin, I. & N.R. Co. 465

CIRCUIT COURT, S. D. IOWA, C. D.

Ross v. Hellyer..... 413

CIRCUIT COURT, D. KANSAS.

Atchison Savings Bank v. Templar.	580
Indianapolis R. M. Co. v. St. Louis, F. S. & W. R. Co. ....	140
Mehrhoft v. Mehrhoff. ....	18
Missouri, K. & T. Ry. Co. v. Union Trust Co. of N. Y. ....	485
State v. Bradley. ....	289
State v. Walruff. ....	178
Templar v. Atchison Savings Bank.	580
Union Trust Co. of N. Y. v. Mis- souri, K. & T. Ry. Co. ....	485

## DISTRICT COURT, D. KANSAS.

United States v. Cosgrove..... 908

CIRCUIT COURT, D. MINNESOTA.

Babcock v. Northern Pac. R. Co.,	756
De France v. Johnson.....	891
Kelly, In re.....	852

	Page
Northern Pac. R. Co. v. St. Paul, M. & M. Ry. Co.	551
Rahn v. Singer Manuf'g Co.	912
St. Paul, M. & M. R. Co. v. Greenhalgh	563
St. Paul, M. & M. Ry. Co. v. Phelps	569
St. Paul, M. & M. R. Co. v. Wenzel	563

CIRCUIT COURT, E. D. MISSOURI.

Blair v. Walker	73
Blue Ridge Clay & Retort Co. v. Floyd-Jones	817
Cambria Iron Co. v. Laclede Wire & Fence Co.	420
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	3
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	11
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	12
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	74
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	896
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	897
Dederick v. Whitman Agr. Co.	755
Dederick v. Whitman Agr. Co.	763
Freund v. Yaegerman	812
Preston v. Smith	884
Sprague-Brimmer Manuf'g Co. v. M. J. Murphy Furnishing Goods Co.	572

CIRCUIT COURT, D. NEBRASKA.

Bohanan v. Giles	204
Hilton v. Otoe Co. Nat. Bank	202
Pollock v. Brainard	732
United States v. Brighton Rancho Co.	218

NINTH CIRCUIT.

CIRCUIT COURT, D. CALIFORNIA.

Buckingham v. Porter	759
Sharon v. Hill	337
Sharon v. Hill	722
Stockton Laundry Case, The	611
Tie Loy, In re	611
United States v. Central Pac. R. Co.	479
United States v. Curtner	296
United States v. Minor	672
Wo Lee, In re	471
Yick Wo v. Crowley	207

CIRCUIT COURT, D. OREGON.

Bybee v. Oregon & C. Ry. Co.	586
Crane v. Runey	15
Dundee Mortgage & Trust Investment Co. v. Cooper	665
Hughes v. Dundee Mortg. & T. Inv. Co.	831
Hughes v. Dundee Mortg. & T. Inv. Co., (two cases)	837
United States v. Hearing	744
United States v. Heilner	80
United States v. Sinnott	84
United States v. Sinnott	89

DISTRICT COURT, D. OREGON.

Abercorn, The	877
Ah Lit, Ex parte	512
Director, The	708
Grand Jury, In re Impaneling and Instructing	749
Hibbs, Ex parte	421
Impaneling and Instructing Grand Jury, In re	749



# CASES

## ARGUED AND DETERMINED

IN THE

## United States Circuit and District Courts.

---

FALLS OF NEUSE MANUF'G Co. and others v. GEORGIA HOME INS. Co.

(*Circuit Court, W. D. North Carolina. October 15, 1885.*)

**1. EQUITY PRACTICE—CONTRIBUTION.**

Where several actions, removed from a state court, are based upon insurance policies on the same property, based on the same application, issued at the same time and by the same agent, containing a clause for contribution, the court will order one of the causes to be transferred to the equity docket, and the other defendants to be made parties, and the pleadings in that case to be reformed according to the equity practice.

**2. SAME—INJUNCTION.**

In such case the plaintiff will be enjoined from further proceedings in the other actions until a final decree in the cause so transferred.

**3. SAME—DOMESTIC COMPANY.**

In such case an action against a resident defendant company pending in the state court will be stayed until such final decree, and such company will be made a party to the suit so transferred.

**Motion to Consolidate, and Transfer to the Equity Docket.**

The plaintiffs instituted an action against the defendant for the recovery of \$5,000 upon an insurance policy in the state court. They at the same time, in the same court, instituted separate actions against eight other insurance companies, one of which was incorporated in North Carolina, upon policies issued at the same time, upon the same property, and upon the same application. All the policies contained the following stipulation:

"In case of any other insurance on the property herein insured, whether valid or not, or made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount so insured thereon; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured,

subject to conditions of average, the policy shall be subject to average in like manner."

The non-resident insurance companies removed the actions against them, respectively, to the United States circuit court, under the act of congress of 1875.

At October term, 1885, of the court, the defendants in the actions removed, being liable each for a proportionate part of the loss, (if liable at all,) insisted that, as each company was liable to contribute only its proportionate amount of the loss, there should be a single ascertainment of the loss incurred, so as to bind all the companies, and that each company should be held (if at all) for the proportion of that sum which the amount insured by it bore to the total amount of insurance, and that, as there could be no consolidation of the suits except in a court of equity, and as the element of contribution was one of equitable jurisdiction, and that as the cases were removed from a court in which, under the new Code of Civil Procedure, law and equity were merged, and the distinctions between law and equity abolished, in order to completely determine the rights of the parties, and to prevent circuity of action, the several causes should be transferred to the equity side of the docket and consolidated.

*Watson & Glenn, J. C. Buxton, and Fuller & Snow*, for plaintiffs.

*W. W. Crump, Graham & Ruffin, Schenck & Price, and John W. Hinsdale*, for the insurance companies.

BOND, J., (DICK, J., concurring,) made the following order:

This cause coming on to be considered upon the motion of the several defendants that this cause be transferred and put upon the equity docket of this court, this court doth now declare that the said several insurance companies—to-wit, the Georgia Home Insurance Company, the Virginia Fire & Marine Insurance Company, the Westchester Fire Insurance Company, the Imperial Fire Insurance Company, the Virginia Home Insurance Company, the Rochester German Insurance Company, and the North Carolina Home Insurance Company—are necessary and indispensable parties to the cause in order that the rights of all the parties may be duly ascertained and administered, and that the same can only be done by a court of equity. It is thereupon ordered and decreed that this cause be transferred and put upon the equity docket of this court for trial, and that the pleadings of parties in said cause be reformed according to the equity practice of this court.

And it thus appearing to the court that the North Carolina Home Insurance Company is a necessary and indispensable party to this cause, it is further ordered and decreed that the plaintiffs proceed, according to the course of this court, to make the said North Carolina Home Insurance Company, and the other insurance companies, parties to the suit transferred.

And it is further ordered that the plaintiffs be enjoined from further proceeding in any action or cause now pending in this court

against any of the defendants first above enumerated, until there shall be a final decree rendered in the cause hereby directed to be framed and put upon the equity docket of this court.

And it further appearing to the court, by the admission of all parties in open court, that the plaintiffs have a suit against the said North Carolina Home Insurance Company, touching the same subject-matter now pending in the superior court of Surry county, in the state of North Carolina, it is further ordered and decreed, in pursuance of the court's intention, that the rights of all the parties in interest may be equally and fully administered, that the said plaintiffs be enjoined, and they are hereby enjoined, from further proceeding in said cause until said final decree may be rendered in this court sitting as a court of equity; and in the mean time that this cause, together with the other causes now pending in this court between the said plaintiffs and any of the said insurance companies, remain and be upon the law docket of this court, until the further order of this court, and, on motion of counsel for each and every one of said insurance companies, they are allowed to be made, and are hereby made, parties defendant to this cause as transferred.

---

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. CO.  
and others, and another, Intervenor.<sup>1</sup>

(Circuit Court, E. D. Missouri. December 10, 1885.)

RECEIVERS—PERMISSION TO CROSS TRACKS OF RAILROAD AND LAY TRACK IN FRONT OF DEPOT.

Temporary permission granted a railroad company to construct and operate its road in front of a depot, and across tracks of road in receivers' hands.

In Equity. Intervening petition.

The intervenor alleges that it is a corporation, and has been authorized by an ordinance of the city of St. Louis to construct its track through said city along a designated route, and that the construction of its track along said route will necessitate its crossing the tracks of the Wabash, St. Louis & Pacific Railway Company, now in the hands of receivers, at several places, and asks permission to lay its track, and cross the Wabash tracks, where necessary, upon payment of damages. The receivers and the defendant, by their separate answers, allege that the ordinance referred to in the intervenor's petition is void; that at the time it was passed the intervenor was not incorporated, and was consequently unable to take any thing under such an ordinance; and that the construction of the in-

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

tervenor's track along the proposed route, and along Lewis street, will interfere with the use of the Wabash depot on that street, by impairing access thereto; that the construction of such a track along said street is not such a burden as was contemplated when said street was dedicated to public use; and that the property in said receivers' hands will suffer great damage if the intervenor's track is constructed along said street, and across the Wabash tracks, as proposed. The Wabash, St. Louis & Pacific Railway Company, by its answer, further denies that this court has jurisdiction over the matter, because the circuit court of the city of St. Louis is vested with exclusive jurisdiction over the condemnation of property in said city for railroad purposes by the constitution and laws of Missouri. The petition having been referred to a master, he recommended that the intervenor's prayer be granted, upon condition that the transfer company pay the cost of constructing and maintaining all crossings; and that, in operating the road at such crossings, the intervenor shall yield the right of way to the Wabash trains.

*Hitchcock, Madill & Finkelnburg*, for intervenor.

*H. S. Priest*, for receivers.

*Henry T. Kent*, for defendant.

BREWER, J., (*orally*.) This is not a case where a foreign corporation comes to this state and sues a domestic corporation, or where the controversy is between citizens of different states, and where there is imposed upon us the absolute duty of determining the ultimate rights of the parties. We have possession of this road by our receivers. That possession is temporary. While it is true we might impose a lien upon the road permanently, following the road through all time, and binding upon whoever should succeed to the title, it does not seem to us that we ought to go beyond the absolute necessities of the case. Considering that our possession is temporary, the orders we make should have a temporary effect only, if by so doing we do not prejudice ultimate and further questions.

Now, so far as the validity of intervenor's incorporation is concerned, it is a *de facto* railroad corporation. If there is any fraud which was perpetrated in its organization, the attorney general of the state can institute proceedings by *quo warranto* to oust it, and that will determine all the rights asserted, or attempted to be exercised. So far as the validity of the ordinance is concerned, it appears to be sufficient to justify us in the action we propose to take. You want the privilege of crossing the tracks in possession of the receivers. You want the privilege of laying your tracks along a street, which, as the master says, will impair access to a depot which belongs to, or the fee of which is in, the Wabash Railroad Company, and which is in possession of our receivers. Now, whether it is necessary that the power of eminent domain should be exercised to appropriate absolutely the right to cross these tracks; whether that constitutional provision of the state of Missouri, that no property shall be

taken or damaged for public use without compensation, is applicable here or not,—I do not think it is necessary for us to determine. Whether this is simply one of those consequential injuries to which that section does not apply, or whether it comes within the plain scope of the section as a “damage” done to the property which actually belongs to the Wabash Company, I think, are questions that may be appropriately relegated to and settled in the tribunals of the state, and by those who shall, within a short time, certainly very brief we hope it may be, become the possessors, owners, and managers of this Wabash road. It is fair, however, to those parties who may subsequently come into control as well as become the owners of this property that security should be furnished to them as against any wrong which may be done by our directing the receivers to permit the crossings; for if that section of the constitution of your bill of rights does apply, it is certainly true that after occupation—after the damage is done—the party injured has a cause of action for the damages; and so, if it be true that the laying of your tracks on that street, in front of that depot, is a damage to the property within the scope of that section, you are responsible after it is done to any action which the Wabash road may maintain for damages.

Back of that, however, is another question which I ought to refer to; and that is, that it is not gracious in the federal court, which has taken possession of property by its receivers, to make that possession an obstacle to any proposed public improvement. We should, so far as lies within our power, extend every facility to every proposed public improvement, simply aiming to preserve the rights which attach to property while it is in our possession, and that is all.

It seems to us that it will be fair for us in this case to overrule the exceptions to the master's report, *pro forma*, permit its confirmation, and direct the receivers to permit the crossing upon entering into the stipulations suggested in the master's report. As to the last one, that the Wabash Company shall have the precedent right of way, I suppose all that is meant by that is that when two trains approach, at or near the same time, the Wabash road shall have the preference in crossing. That, perhaps, might be made a little more definite in the stipulation, and that stipulation should be signed by the company. Therefore we confirm the report of the master, in part, with the further stipulation (and to that extent we overrule the master's report) that you give a bond, with sufficient securities, in the sum of \$50,000, to pay all damages which shall hereafter in an appropriate action be awarded to the receivers, or to the Wabash road, or its successors, for any damages which the property sustains by reason of your crossing the tracks and laying tracks in the manner proposed.

*Mr. Hitchcock.* There is only one thing I wish to suggest, and I think that I may assume to say what I know is the purpose of the transfer company, that they will not make any objection to the finding of the court, if, as we understand it, we are not to be put in a

position to be debarred from the fruit of the order; that is, we should not be put in a position to be enjoined on the ground that we had not made compensation before we undertook to do this.

*The Court*, (BREWER, J.) We have possession of the road, Mr. Hitchcock, and, as far as we can, give permission to occupy during the possession of the receivers.

*Mr. Hitchcock*. The receivers, we do not think, would be likely to do it; but we submit, whether the Wabash, which is the party to do it, will be put in a position, if they choose to seek damages, which shall take away from us the fruit of this order.

*The Court*. That is a question, I think, which we ought to relegate to the state courts to settle.

*Mr. Hitchcock*. This order will give us, conditionally, the right to do what we desire, on the conditions specified.

*The Court*. Yes.

*Mr. Hitchcock*. That is, on condition of giving a bond in the sum of \$50,000?

*The Court*, (TREAT, J.) I doubt very much whether the report of the master, as presented to us, involves what you call proceedings for the condemnation of property. This property is in the possession of the officers of this court, and this proposed action is more in the nature of a license to do certain things. That is the meaning of all this,—that the receivers permit these things to be done upon your giving a bond, which, of course, extends as long as we have any control over the road. What may happen thereafter somebody else must provide for.

*Mr. Priest*. I understand your honors to mean that no rights which the receivers might have, by reason of their control of the road, to any damages occasioned by reason of this interference, are to be determined in this matter; that this, in fact, amounts to an adjudication of nothing, so far as the ultimate rights of the parties are concerned.

*The Court*, (BREWER, J.) In view of the situation, we think it would be ungracious and improper in us to stand in the way of what is apparently a public improvement; and as to the mere matters of compensation, damages, and things of that kind, we do not think we ought now to determine them.

*Mr. Priest*. Then the receivers may be so advised by counsel not to institute a suit to recover damages by reason of this occupation; in other words, this finding of your honors leaves it in that way, as I understand?

*The Court*, (BREWER, J.) The mere question of damages can be litigated hereafter. As to whether and how much these receivers are damaged during the brief time they occupy the road, may present a different question.

*Mr. Hitchcock*. Is this bond to be made to the benefit of the receivers of the Wabash road, or its assigns?

*The Court*, (BREWER, J.) We have in our state a provision that

bonds in similar proceedings may be given to the state, and sued upon by any person entitled to the benefit of them.

*Mr. Priest.* There is no such provision in our law.

*Treat, J.* You can make it to the clerk of the court.

*Brewer, J.* Conditioned for the payment of all damages which may accrue to any person interested by reason of crossings, etc.

*Treat, J.* I would like to have it a little more definite in reference to this preference of right of way. Perhaps all railroad men know what it means. Certainly it does not mean that the Wabash can leave a whole train to stand indefinitely on the crossing, so that the train of the other road cannot cross. I should like to have it a little more precise on that point.

*Mr. Priest.* I think we understand the order and the spirit in which it is intended.

*Mr. Hitchcock.* It is a thing understood among railroad men that where trains approach a crossing, and the question is raised which shall stop, that the older company shall have the right to go over first.

*Treat, J.* Well, you can prepare the order in that form.

*Mr. Priest.* There will be no disagreement about that matter.

*Treat, J.* The only thing is to exclude a conclusion.

*Mr. Priest.* I wish to suggest, in case the intervenor should want to appropriate that part of the property not expressed in the dedication which constitutes, properly, the right of way of the Wabash Company, that the bond ought to be increased. The finding of the master only goes to the extent of this piece of property on which he has reported, viz., the crossings and the depot property, and does not include property lying on North Market street.

*Brewer, J.* We have no data to estimate that.

*Mr. Priest.* There was testimony in regard to the measure of damages.

*Mr. Hitchcock.* That was reserved by consent of all parties. That matter can go back. We do not think we shall want to use that.

*Brewer, J.* Perhaps you should send that back to the master.

*Mr. Hitchcock.* I suggest the confirmation of the report be accompanied with an order that the matter be referred to the master for further consideration, with leave to the intervenor to apply for a reference to the master in the event it is desired to construct tracks on that land.

*Mr. Priest.* I suggest that all difficulties of that sort can be obviated by increasing the bond to \$75,000.

*Brewer, J.* We do not think there is any occasion for that. It is pretty large, anyhow, and that would be increasing it upon a mere possibility. If they do not want to occupy it, there will be no use of speculating as to damages.

(December 11, 1885.)

Counsel for intervenors stated that he had prepared and was ready to submit an order in accordance with the finding of the court ren-

dered yesterday. Counsel for the receivers stated that they had not had an opportunity to examine the order carefully; but, from the casual examination which they had given it, they had discovered some parts of the order were objectionable, and not in accordance with the finding of the court on yesterday.

*Treat, J.* You will understand that we direct our receivers to allow these tracks to be laid upon the party giving bond to answer to any damages that may accrue to the receivers or their successors, and there we stop. We have nothing more to say. We hope to get rid of this property at an early day, and then the purchasers may litigate these matters wherever they please. We are not going to charge a perpetuity or burden upon this property while it is in our possession temporarily.

*Mr. —.* But while it is in the possession of the court it will permit these crossings to be made?

*Treat, J.* Yes.

*Mr. Priest.* I understood this question to be addressed to Judge BREWER, on the supposition that the Wabash Railway Company for itself might undertake to prevent the location of these tracks, so far as its interests were concerned,—that is, a remainder interest, not a present possession or interest, but whatever future interest it may have,—that the courts would be open to it for the protection of those interests in any manner it might deem advisable.

*Treat, J.* The simple proposition was this. Perhaps you did not catch the remarks of Brother BREWER in their entirety, and I did not wish to supplement them, except on one or two points, that the finding might be understood. Here is a property, as far as the court is at present advised, by which you have spurs, so to speak, running down to the river in every direction. Here is a rival road, if you choose, that cannot accomplish its ends without crossing your various spurs. Now your various spurs depend upon different titles. For some you have a license from the city. If we take up for adjudication each one of these crossings, with separate interests, there might be very important separate inquiries. In regard to the depot, you have the question of "damages," as well as the condemnation of the absolute right of property elsewhere. There are many grave questions involved, but this court did not choose to pass upon those at all, for the reason that this property is in the hands of the receivers of this court temporarily. What shall be done with the property while in the hands of the receivers is one question, and the court would not undertake to adjudicate, through the process of condemnation, or otherwise, the ultimate determination of questions connected with this vast property. It is no part of the business of this court, when this property is in the hands of the receivers, to adjudicate such questions at all. We cannot go back and create any rights or liens on this property that shall pass, not only as against the present owners of the property, but against all purchasers hereafter, or estab-



lish new liens or demands. The point I insisted upon in conference with my Brother BREWER was that we could not do that. We simply preserve the property for the interests of all concerned. Here was a novel question presented,—novel in this one sense, viz., that this property was in the hands of a receiver; there is another public enterprise; and if we did not permit the receivers to assent thereto, another great enterprise would be obstructed. You are all here under a franchise from a common government, which looks to the public good. That is the underlying thought. Now, we say we will allow our receivers to permit the crossings, etc., without charging any permanent servitude on the property at all. We will do nothing but grant what might be called “a license.” That is all these parties are going to acquire, so far as this court is concerned, during the pendency of the receivership. We will permit this to be done on the giving of a bond to respond to any damages of parties in interest. We don’t decide ultimate questions at all. That may be done hereafter. If this road goes to a foreclosure and sale, parties may do whatever they choose,—we don’t propose to pass on those questions, and intended to eliminate them entirely.

*Mr. Priest.* That, I understand, is in regard to the possessory interests of the receivers, so far as they are concerned, and I only look to their interests in this matter.

*Treat, J.* They are the officers of the court, and we direct them to do this on receiving this bond. That is all. If there are questions behind that, which go to the ultimate determination of titles, etc., this court is not going to pass upon them at present. Let the proper tribunal pass upon them when they arise. We do not determine what that proper tribunal is. We merely say we will not do it now.

*Mr. Priest.* I am glad to have the expression of the court upon this point. It is suggested that the receivers may, possibly, during the continuance of their possession, suffer damages by reason of the crossing at this depot.

*Treat, J.* Well, they will have to be paid. The bond that we retain for damages, if there are any, is for that purpose.

*Mr. Priest.* How are we to ascertain those damages?

*Treat, J.* That will go to the master at the proper time.

*Mr. Priest.* By petition filed?

*Treat, J.* Oh, no. It is a part of the pending matter. There is no need of going through it again.

*Mr. Priest.* We wish to be careful, so that the jurisdiction may be preserved against the parties to respond to any action which the receivers may present, by way of a bill, against them, before the master, for such damages as they may sustain.

*Treat, J.* Judge BREWER said yesterday,—perhaps you did not catch it,—“Reserving all further questions in regard to any damages that may be sustained in the pending matter.” There is no need of bringing a new action at all. We retain the case as presented, on the

application of Mr. Finkelnburg. You ask certain things. You have failed to agree. It has been before the master. It comes back on exceptions. *Pro forma* we overrule those exceptions, and make an order of our own that, instead of paying so much money, etc., you give a bond in the form prescribed; and the application is reserved for the further consideration of the court under the bond, and it does not require any new proceeding at all.

*Mr. Priest.* I understand it now. I did not understand Judge BREWER. The draft of the order, as submitted to me, does not contemplate that interlocutory decree, but is a final determination of the matter.

*Treat, J.* There is no final determination.

*Mr. Kent.* That is exactly what we want reserved.

*Treat, J.* That was reserved. The exceptions were filed to the master's report. They were overruled *pro forma*. That is a very expressive phrase, indicating that we do not pass on the merits of anything underlying it, but in the light of what was said, and in the light of that report, we chose to make a new and independent order, not following the master in the report at all. We give a new and independent order that, instead of your paying \$25,000, you shall give a bond, which was entirely outside the master's report. It seems to me the decree can be written in this matter very concisely, and accomplish all that is desired, to-wit: "This matter having come on to be heard," etc., "the court orders, adjudges, and decrees as follows,"—that is all. Then say that we overrule *pro forma* the exceptions to the master's report; and thereupon the court orders, adjudges, and decrees as follows, to-wit: That the receivers permit the crossings to be made of the property now in their custody under the orders of this court, on the giving of a bond in the sum of \$50,000 to respond to any damages that may accrue to the receivers or their successors in interest, to be hereafter determined, and said crossings to be conducted as you have agreed on, reserving all questions under the said bond as to any damages that may accrue during the pendency of the receivership.

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co. and others.<sup>1</sup>

(Circuit Court, E. D. Missouri. January 5, 1886.)

## RECEIVERS—TAXES—REV. ST. MO. § 6754.

The fact that the property of a corporation is in the hands of a receiver of this court does not exempt it from seizure and sale by the collector of taxes, under section 6754 of the Revised Statutes of Missouri.

In Equity. Information against the county collector of Chariton county.

*Wells H. Blodgett*, for receivers.

BREWER, J., (*orally*.) An application was made to me yesterday to issue an attachment against the collector of taxes in one of the counties of this state, who had issued his warrant and levied on an engine belonging to the Wabash road, and now in the possession of the receivers. It is not represented in the petition that the taxes are not just and legal, or that they are not due. The statutes of Missouri make it the duty of the collector, if the taxes are not paid, to issue his warrant and seize property, and sell the same as upon execution. It is suggested that there is no danger of this property being placed beyond the jurisdiction of the county, and no doubt but that the taxes will be paid in a few days, and it is intimated that perhaps the collector is proceeding summarily in this way for the mere sake of obtaining the fees which the statute authorizes him to charge whenever he makes a levy. Be that as it may, I think that in levying and collecting taxes the state is exercising its sovereign power, and that there should be no interference with its collection of those taxes in its prescribed and regular methods, even by a court having property in the possession of its receivers, unless it is first charged that the taxes are in some way illegal or excessive. The mere fact that the receivers have no money on hand to pay the taxes is no excuse for stopping the process of the state for their collection. It may be hard for the road to pay these taxes, but it can be no harder for a corporation in the hands of receivers to pay taxes than it is for an individual, and the remedy of the state is in each case the same. The application for attachment will be denied.

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

**CENTRAL TRUST Co. and another v. WABASH, St. L. & P. Ry. Co. and others. (Yakey, Intervenor.)<sup>1</sup>**

(Circuit Court, E. D. Missouri. January 5, 1886.)

**RAILROAD COMPANIES—FENCES—DOUBLE DAMAGES FOR KILLING CATTLE—RECEIVERS—REV. ST. MO. § 809.**

The fact that a railroad is in the hands of receivers of this court does not make it any the less liable under section 809 of the Revised Statutes of Missouri for double damages for killing cattle.

**In Equity.** Petition for rehearing on the intervening petition.

The intervenor asks in his petition for double damages for the killing of two heifers by the Quincy, Missouri & Pacific Railroad, June 11, 1884, and alleges that the heifers were reasonably worth when killed \$550, and \$50, respectively. The double damages were claimed under section 809, Rev. St. Mo. The claim having been referred to a master, he reported that the intervenor was not entitled to double damages, and that the cattle were only worth \$200, and \$30, respectively. He recommended, therefore, that the following order be entered: "Ordered that the receiver herein pay to Peter H. Yakey out of the incoming rents and profits of the property in their charge, not otherwise appropriated by the previous orders of this court, the sum of \$230, with interest at the rate of six per cent. from the thirteenth day of June, 1885." The intervenor excepted to this report, and it was overruled by TREAT, J., as to double damages not being allowable, and in other respects confirmed. The matter now comes up on a motion by the receivers for a rehearing, asking that the master's report be confirmed in all things.

*H. S. Priest, George S. Grover, and E. Smith, for receivers.*

*James Carr, for intervenor.*

BREWER, J., (*orally*.) In this case the only question is whether the double damage act of the state of Missouri is to be enforced as against railroad property in the hands of a receiver. The supreme court of the United States have affirmed the validity of that act;<sup>2</sup> and I know of no reason why it is not applicable to every road in the state, whether in or out of the hands of a receiver. It is true there may be no equity, where the court takes possession of the assets of an insolvent corporation, in saying to one man, whose cow is killed, "We will double the value of your cow as a basis of adjustment," and to a man who has done a day's work, "We will adjust your claim only at the value of such work," and then distribute the assets upon that basis between them. But while there may be no equity in that mode of distribution, (and so I said in response to a letter written by some one who wanted to have me send all these cow cases to the state courts for trial,) yet when the question is put directly before the court

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

<sup>2</sup> Missouri Pac. Ry. Co. v. Humes, 6 Sup. Ct. Rep. 110.

as to whether it will or not recognize the binding force of the statute against a road in the hands of its receivers, I have no doubt but that it is its duty to recognize it as binding, and adjust the compensation accordingly. The exceptions to the report of the master will be sustained, and the petition for rehearing denied.

---

MEHRHOFF v. MEHRHOFF and others.<sup>1</sup>

(Circuit Court, D. Kansas. January 2, 1886.)

1. HUSBAND AND WIFE—ACTION BY WIFE FOR ALIENATING HUSBAND'S AFFECTIONS—COMP. LAWS KAN. c. 62, §§ 1-4.

A married woman, in Kansas, can maintain an action in her own name for the alienation of the affections of her husband, and depriving her of his society, care, and support.

2. SAME—PLEADING—COMPLAINT—DEMURRER.

In an action by a wife to recover damages for the alienation of her husband's affections, a complaint alleging that defendants began systematically to poison and prejudice the mind of her husband by telling him false stories about her, and charging her with unwillingness and inability to do housework, and by treating her with gross disrespect in his presence, and finally by falsely and maliciously charging her in his presence with having committed adultery, is not sufficient, except as to the allegation as to the charge of adultery, and as to that it should be made more specific by stating the time and place where the words were spoken, and what words were used.

At Law. The opinion states the facts.

*Day & Dodge and Maher & Osmond*, for plaintiff.

*H. D. McMullen and Dieffenbacker & Banta*, for defendants.

FOSTER, J. The plaintiff sues to recover damages for an alleged violation of her marital rights, in this, to-wit: that the defendants, who are the father and mother of William Mehrhoff, her husband, conspired to separate the plaintiff and her said husband, and to deprive the plaintiff of the care and society of her said husband, and alienate his affections from her; that, to accomplish the said purposes, the defendants began systematically to poison and prejudice the mind of her husband against her by telling him false stories about the plaintiff, charging her with unwillingness and inability to do housework, and by treating plaintiff in her husband's presence with gross disrespect, and finally by falsely and maliciously charging the plaintiff, in her husband's presence, with having committed adultery,—by reason whereof, the affections of the plaintiff's husband were alienated from her, and caused him to treat her badly, and with such cruelty that she was compelled to take her infant child and flee from her husband's domicile in the night-time, and that he has completely abandoned her and said child; that he has no property out of which she could

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

be decreed alimony, etc., to her damage, \$5,000. To the petition defendants file a general demurrer.

The main question presented in this case is this: Can a married woman maintain an action in her own name for the alienation of the affections of her husband, and depriving her of his society, care, and support? It must be said that no such right of action existed under the common law by reason of the legal unity of husband and wife. Has the legislation on the rights of married women in this state removed this barrier of the common law? In *Westlake v. Westlake*, 34 Ohio St. 621, this question is discussed at length under the statute of that state, and the court, by a divided bench, (a majority of one,) held that the wife could maintain her action. In *Logan v. Logan*, 77 Ind. 558, the court, by a majority of one, decided that under the statutes of Indiana the wife could not maintain an action, but, the words being slanderous, she could maintain her action of slander. It will be observed from reading these cases that under both the statutes of Ohio and Indiana the right of a married woman to sue or be sued alone was restricted to certain subjects and causes of action. Under the statutes of this state the right of a married woman to sue and be sued is without restriction or limitation in terms. It reads as follows: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried." St. 1879, c. 62, § 3. The statute also protects her in the enjoyment of her separate real and personal property, and gives her the right to sell and convey such property, and make contracts in reference thereto, to the same extent as a married man in relation to like property of his own. It also authorizes her to carry on trade and business, and perform labor and service on her sole and separate account, and makes her earnings her sole and separate property, and gives her authority to invest the same in her own name, etc. Sections 1-4, c. 62, Laws 1879.

In reference to the matter of suing or being sued she stands on the same footing as the unmarried woman. For any violation of personal rights an unmarried woman has the same remedy that a man has. She may sue for an injury to her character, her person, or her property. A right of action to this extent is clearly given to a married woman under the statutes. *Furrow v. Chapin*, 13 Kan. 112; *Townsdin v. Nutt*, 19 Kan. 284. Words imputing unchastity to a female give her a right of action for slander, and it seems to me that the provision of the statutes of Kansas was intended to and does liberate a married woman from the common-law disability, so far as to enable her to sue for any violation of her personal rights, as well as for injury to her property; and, in the words of the court in the case of *Westlake v. Westlake*, *supra*: "If at common law the husband could maintain an action for loss of *consortium* of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of *consortium* of the husband." It is quite apparent by the language used that it is the intent of the statute that a

woman, so far as the power to assert or maintain her rights in a court is concerned, should not be affected by coverture; and the law in that respect places her where she was before the marriage. It is true this right of action grows out of a relation only arising where the married relation exists, but I have but little doubt that it comes within the spirit and intent of the law, and that it was the purpose of the legislature to permit a married woman to sue for a violation of her personal rights, although such rights grow out of the marital relations.

It should be remarked, in conclusion, that it is very doubtful if the words or conduct imputed to the defendant are sufficient to base this action upon, with the exceptions of the words charging the plaintiff with adultery. *Lynch v. Knight*, 9 H. L. 577, cited in *Westlake v. Westlake*. As to this particular charge, the time and place and, if possible, the words spoken should be set out in the petition, so that the defendants may be informed exactly what charge they are required to meet.

The demurrer will be sustained as to the latter objections,—that is, the insufficiency of the allegations in reference to the words spoken, as I have indicated,—and overruled as to the other question, with leave to the plaintiff to amend within 20 days.

---

### CRANE v. RONEY.

(Circuit Court, D. Oregon. January 18, 1886.)

#### 1. MONEY RECEIVED ON ERRONEOUS JUDGMENT.

Where money is received on an erroneous judgment by a party thereto, the law, on a reversal of the same, raises an obligation against such party to restore the amount, which obligation may be enforced by an action as for money had and received to the use of the plaintiff therein.

#### 2. CASE IN JUDGMENT.

In a suit to enforce a mechanic's lien, the parties thereto, with others having liens on the same property, were made defendants, and the court, by its decree directing the sale of the property and the distribution of the proceeds among the parties, postponed the payment of the plaintiff's claim to that of the defendants, which portion of the decree the supreme court, on appeal taken after the confirmation of the sale and the distribution of the proceeds, reversed, and also ordered a resale. *Held* that, on the reversal of the erroneous decree, the defendant, in contemplation of law, held the money wrongly received by him thereon for the use and benefit of the plaintiff, to whom it should have been originally adjudged and paid, and that he might maintain an action to recover the same as for money had and received to his use; and the order of resale did not limit or affect his right in this particular.

Action to Recover Money.

*Claude Thayer*, for plaintiff.

*Raleigh Stott*, for defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, to recover from the defendant, a citizen of Oregon, the sum of

\$1,216.25, had and received by the defendant to the use of the plaintiff. The defendant demurs to the complaint, for that it does not state facts sufficient to constitute a cause of action. It is alleged in the complaint that on March 19, 1878, the defendant received from the county clerk of Clatsop county, to and for the use and benefit of the plaintiff, said sum of money, which of right should have been paid to him; that such clerk received said money as the clerk of the circuit court for said county from the sheriff thereof, as a part of the proceeds of the sale of certain real property theretofore sold by him to G. W. Parker, on a decree of said court, in a suit wherein J. C. Trullinger was plaintiff, and N. Kofoed, Mary Kofoed, G. W. Parker, and the parties hereto were defendants; that the money paid to defendant as aforesaid was so paid in accordance with an erroneous provision in said decree, which, on appeal to the supreme court of Oregon, was thereafter, on August 25, 1879, so modified that the plaintiff was thereby adjudged to be entitled to the said \$1,216.25, but the defendant still retains the same and refuses to pay it over to the plaintiff, although often requested so to do.

The law is well settled that on the reversal of a judgment an obligation arises on the part of the party to the record who has received the benefit of the erroneous judgment to make restitution to the other party of or for what he has thereby lost. The reversal of the judgment gives a right of action as between the parties thereto, and creates an obligation against the one who has had the benefit of the same to restore to the other what he has thereby lost. At one time it was the practice to obtain this restitution, either by a writ of restitution when the record showed what had been lost or what money had been paid, and in other cases by a *scire facias quare restitutionem non*, issued out of the court where the judgment was given. But with the growth of the action for money had and received, these proceedings fell into disuse, and the obligation to restore has long since been enforced by action; and under the Code there is no other remedy that I am aware of. *Bank of U. S. v. Bank of Washington*, 6 Pet. 17, 19; *Clark v. Pinney*, 6 Cow. 299. And see *Yates v. Joyce*, 11 Johns. 140; *Hoxter v. Poppleton*, 9 Or. 482; *Rapalje & S. Law Dict.*, "Restitution," "*Scire Facias*."

Upon the facts stated in the complaint, this seems to be a clear case for recovery. There appears to have been a decree of the circuit court for Clatsop county, ascertaining and determining the rights of the parties in the suit mentioned therein, in a fund then in court or to be there, arising from the sale or disposition of certain property in pursuance of the order of the court, which decree erroneously gave the sum now sued for to the defendant herein instead of the plaintiff, and for that reason was reversed on an appeal to the supreme court. By this erroneous decree the plaintiff lost the \$1,216.25 that the defendant obtained; but, as soon as it was reversed, the law created an obligation against the latter to return what it then appeared did



not belong to him but to the plaintiff, for whose use and benefit the defendant is thereafter deemed to have received it.

On the argument, however, counsel for the defendant undertook to put a new face on the facts by citing and reading the opinions of the supreme court in the case of *Trullinger v. Kofoed*, 7 Or. 228, and 8 Or. 436. But while a reference to these opinions may give the court a knowledge of some matters connected with said case not contained in the complaint, they cannot be allowed to vary the legal effect of the facts stated therein. The case before the court is confined to the facts stated in the complaint. But really there is nothing in the reports of *Trullinger v. Kofoed* contrary to the case stated in the complaint.

From the report in 7 Or. it appears that a suit was brought by Trullinger to enforce a mechanic's lien against certain property of N. Kofoed and Mary, his wife, in which suit G. W. Parker and B. G. Crane, mortgagees of the same property, were made defendants, and also Peter Runey, who claimed a lien thereon by virtue of a mechanic's lien and a mortgage for the same debt,—the former being prior in time to Crane's mortgage and the latter subsequent thereto. And thereupon a controversy arose between the plaintiff and defendant herein as to which of them had the prior lien. The court below decided the question in favor of Runey, and directed the proceeds of the sale of the property, which amounted to \$4,218.20, to be distributed accordingly, which was done; but, on an appeal to the supreme court, it was decided that Runey, by taking a note and mortgage for his debt, waived his mechanic's lien, and the decree in this respect was reversed, and direction given for a decree postponing the payment of Runey's claim to that of Crane's. From the report of the case in 8 Or. it appears that the appeal was not taken by Crane until after the order confirming the sale was made, and that it was then taken both from the decree determining the rights and priorities of the parties, as well as such order; and that, on the hearing, the court remanded the case, with the further direction that a resale be made. The court below made the order for resale in pursuance of the mandate, but it does not appear that any such sale has been made; and counsel for the defendant insists that the plaintiff's remedy is by means of this resale. But unless the property will sell for more than it did before,—and it is not likely that it will,—a resale will be of no benefit to any one, and a useless expense to whoever undertakes it; and the plaintiff is under no obligation to resort to it, if it would.

The property brought enough to pay his claim, or so much of it, at the first sale. But this amount,—\$1,216.25,—instead of being paid to him, was, in pursuance of the erroneous decree, paid to the defendant, who is, by the reversal of such decree, bound to restore the same to the plaintiff, without any reference to the order of resale, with interest from the date of such reversal. The order of resale was presumably made for the benefit of the defendant, whose claim is now

postponed to all the others. By this means he may save himself by bidding at such resale a sum sufficient to cover his claim. At the first sale there was no inducement for him to do so, as the sum bid covered his claim where it then stood; and probably the owner of the property has a right to have this resale made, with a view of further satisfying the demands against him on account of it. But so far as the sum in controversy in this case is concerned, the plaintiff has no interest in the question. In contemplation of law, he has already received this amount, and cannot get it again, either from the property or its owner. He must look to the defendant, who received it in fact, but, as it turns out, only for his use.

The demurrer is overruled.

---

### CHARLESTON FRUIT CO. v. BOND.

(*Circuit Court, S. D. Georgia, E. D. November Term, 1885.*)

#### 1. CONTRACT—BREACH—MEASURE OF DAMAGES—PENALTY.

Notwithstanding the apparent conflict of authorities, it is clear that where the damages for the breach of all the stipulations of a contract are uncertain in their character and cannot be readily ascertained, the sum fixed will be regarded as the settled and agreed damages; but where some of the breaches are ascertainable and some not, as it is a penalty as to some, it is a penalty as to all.

#### 2. SAME—AMOUNT TO BE FORFEITED.

It would be manifestly at variance with the principle of just compensation, where there are many stipulations in a contract, some trivial and some grave, some ascertainable in damages and some not, to hold that it was intended a large sum should be forfeited for any breach.

At Law.

It was agreed that the court should direct the verdict.

*Garrard & Meldrim*, for plaintiff.

*Denmark & Adams*, for defendant.

SPEER, J. The plaintiffs are dealers in tropical fruits in the city of Charleston. The defendant deals in the same products in the city of Savannah. A contract was made between these parties by which it was agreed that the plaintiffs, from November 1, 1884, to May 1, 1885, would sell to the defendant, and deliver on board the cars at the Charleston & Savannah Railway depot, in Charleston, from each vessel consigned to the plaintiffs not less than 200 nor more than 500 bunches of bananas, and not less than 2,500 and not more than 5,000 cocoa-nuts. For January, February, March, and April, 1885, not less than 200 and not more than 500 bundles of bananas, and cocoa-nuts to a number optional with defendant, but not to exceed 5,000. The defendant agreed to receive the specified quantities of fruit and nuts on the cars at the depot, and then plaintiff had no further care concerning them. The defendant agreed to pay for the fruit \$1.10 per

bunch for bananas, and \$30 per 1,000 for cocoas, each shipment to be paid for in 30 days. The defendant contracted not to import, nor cause to be imported, nor be interested in, nor associated with, any other parties in the importation of bananas or cocoas from November 1, 1884, to May 1, 1885, and should any cargoes of fruit arrive in Savannah during the specified period he agrees not to ship on commission to Charleston, nor to permit others so to ship, if in his power to prevent it, any portion of such cargo to any other person than the plaintiffs. The contract contains two clauses from which springs the litigation in this court. They are as follows:

"The said party of the first part do hereby agree and bind themselves not to sell any other party or parties any bananas and cocoa-nuts, during the existence of this contract, in the city of Savannah, Georgia, except Joseph B. Reedy."

And this:

"For the faithful performance of this contract we do each bind ourselves, one to the other, in the penal sum of \$1,000."

The contract contains no other stipulations of a material character.

It is clear from the evidence that the plaintiff, just before the Christmas holidays, 1884, sold a large quantity of bananas and cocoas to one Cheatham, a fruit dealer in Savannah. This was within the period named in the contract. It was a plain violation of its terms, and the sale was accompanied with such circumstances of disregard for the provision of the contract, with reference to this stipulation, as were likely to irritate the defendant. In the mean time the contract had been partly performed, and a large quantity of bananas and cocoa-nuts had been shipped to the defendant. On this breach, notifying the plaintiffs that he had discovered what he deemed their breach of contract, the defendant withheld \$1,000 due on account of these shipments to him; and this action is brought by the plaintiffs to recover that amount.

The plaintiffs having thus committed a breach of their contract, their right to recover in this action depends on the determination whether the sum mentioned is to be held a penalty or liquidated damages. If this be a penalty, the defendant has no authority to withhold any portion of the amount due to the plaintiffs. If, on the other hand, the sum is the liquidated damages for breach of the agreement, fixed and agreed upon between the parties, that very sum is the ascertained damages, and he would be entitled to retain it.

An English judge has said, after an examination of this very question: "The only thing I am certain about is that there is a conflict of opinion." This much, however, is clearly settled: the question whether a sum mentioned is a penalty or liquidated damages is one of construction, looking to the real nature and substance of the agreement. The words "liquidated damages" are not conclusive; nor, where it is expressly declared a penalty, is the court bound by the

language. On the general question, however, we find, not only *dicta* opposed to *dicta*, but decisions opposed to decisions.

It will be observed that there are a number of covenants in the contract under consideration. Stipulation is had as to delivery of goods, and the place is fixed. The quantity is specified from each cargo in November and December, 1884, and a different quantity for March and April, 1885. The price to be paid is named, and the time of payment. The defendant is not to import, or cause to be imported, or to ship to Charleston, except to plaintiffs, any such merchandise. The plaintiffs stipulate that they will not sell to any other person in Savannah, except to Reedy. The defendant is to have the privilege of inspecting the fruit in Charleston. For the faithful performance of the agreement, embracing all these stipulations, the parties each bind themselves, one to the other, in the penal sum of \$1,000.

The Code of Georgia (paragraph 3, § 2757) affords a lucid statement of a cardinal principle of construction of contracts:

"The construction which will uphold a contract in whole or in part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part."

It follows that we cannot, from the consideration of questions arising from clauses of greater importance, eliminate the legal consequences flowing from the presence of stipulations of minor importance. Now, there is a numerous class of cases which show that where there are a number of things to be done, and one large sum is to be paid in respect of the non-performance of various matters of different degrees of importance, then the court will construe the sum, if it can do so, as a penalty, and not as liquidated damages. *Wallis v. Smith*, 21 Ch. Div. 250.

In the leading case of *Kemble v. Farren*, 6 Bing. 141, Chief Justice TINDAL, in giving the opinion of the full court, while stating and holding the proposition insisted upon by defendant's counsel here,—viz., that if the claim be limited to breaches which were of an uncertain nature and amount, it would have had the effect to ascertain and liquidate the damages,—goes on to say:

"If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. a day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

It is safe, in view of the apparent conflict, to say that when the damages for a breach of all the stipulations are uncertain in their nature, and cannot be ascertained, the sum fixed would be regarded

as the settled and agreed damages; but when some of the breaches are ascertainable, and some are not, in that case, as it is a penalty as to some, it is a penalty as to all. *Atkyns v. Kinnier*, 4 Exch. 776. This distinction will be found to be fully sustained by the American authorities. Applied to the case at bar, it would determine in favor of the plaintiff's right to recover.

In *Suth. Dam.* 512, it is stated that when the damages are uncertain or difficult of proof, and the result is not manifestly at variance with the principle of just compensation, the sum is held liquidated. But it would be manifestly at variance with the principle of just compensation, when there are many stipulations, some trifling and some grave, some ascertainable in damages and some not, to hold that it was intended that a large sum should be forfeited for any breach.

In *Swift v. Crow*, 17 Ga. 609, it is held where there is a covenant to perform several things or pay the sum specified, and the claim may extend to the breach of any stipulation, in such case, it seems to be well settled that the sum specified should be in the nature of a penalty.

Four text writers of recognized usefulness, if not authority, sustain this proposition. In *Suth. Dam.* 424, after reviewing an array of authority, the author concludes:

"This is believed now to be the doctrine generally held. If a gross sum is stipulated to be paid for any failure to fulfill an agreement consisting of several parts, and requiring several things to be done or omitted, it is a penalty."

*Wood's Mayne*, *Dam.* 209, is identical in substance.

2 *Sedg. Dam.* 250, and note, discussing *Kemble v. Farren*, the author states:

"A distinguishing mark which the court seems to have had in mind in deciding the case was that there were stipulations of different degrees of importance, some trivial in character, all secured by one large sum. And the rule generally deduced from the case by subsequent decisions, and applied in practice, is that a sum fixed as security for the performance of a contract containing a number of stipulations of widely different degrees of importance, breaches of some of which are to be capable of accurate valuation, is to be regarded as a penalty."

See, also, *Field*, *Dam.* 137-154.

An exceedingly clear exposition of this doctrine is found in the Circuit Court Reports of Mr. Justice Woods, (*Taylor v. Steamer Marcella*, 1 Woods, 302,) and is of great weight and force of authority.

The court has examined with care all of the decisions cited in the able argument of the counsel for the defendant. They do not affect the rule already stated. Without exception they construe contracts where there is but one stipulation, or where no damage is ascertainable,—in one an agreement to procure an assignment of a mortgage, in another not to run a stage, another not to practice as surgeon or apothecary, again not to keep a victualing-house, and several not

to keep drinking-houses. The distinction between decisions of this class and the case before the court is obvious.

The conclusion is that the sum fixed in the contract under consideration is a penalty; and, the defendant having specified no damage, the plaintiff must recover.

The jury will find for the plaintiff a verdict for \$1,000, with interest and costs of suit.

**MORRIS, Adm'r, etc., v. CHICAGO, M. & ST. P. R. Co. (Three Cases.)**

*(Circuit Court, N. D. Iowa. November Term, 1885.)*

**1. RAILROAD COMPANY—HIGHWAY TRAVELER—ACCIDENT—SUNDAY—RECOVERY, HOW AFFECTED.**

If a railroad company had no right to run a train on Sunday, and if the evidence in the case shows no right on the part of one driving a wagon over the track on that day, whereby the death complained of occurred, the fact of the running of the train on that day has no effect as to a recovery.

**2. SAME—CROSSING AT GRADE—LAW OF IOWA.**

Under the laws of Iowa there is nothing to prevent a railroad track being laid on an even level with a highway.

**3. SAME—RECIPROCAL DUTIES—VIGILANCE, WHAT IT IS.**

The rights, duties, and obligations of a railroad company, and of travelers who drive across its track, are mutual and reciprocal. Both should keep such a lookout as a prudent man would in endeavoring to perform his duty.

**4. SAME—PRECEDENCE—RIGHT OF WAY AND REASON THEREFOR.**

A railroad train, upon approaching a crossing, has precedence and the right of way over highway travelers, on account of the celerity of its motion and the difficulty of stopping it within a short distance.

**5. SAME—WARNING BY APPROACHING TRAIN.**

A railroad train must give warning to highway travelers, and that warning must be reasonable and timely.

**6. SAME—WARNING REQUIRED BY IOWA STATUTE—FURTHER WARNING.**

Under the laws of Iowa, when a train is within at least 60 rods of a highway crossing in front of it, there must be given two blows of its locomotive whistle, and its bell must be rung from then on continuously until the crossing is passed. But if, under the circumstances of the case, additional warning would seem necessary, such additional warning must be given.

**7. SAME—HIGHWAY TRAVELERS—DILIGENCE REQUIRED.**

Highway travelers approaching a railroad crossing are charged with diligence to ascertain if a train is about to pass by; and their diligence must be greater accordingly as the peculiar locality and the circumstances of the case seem to require greater caution.

**8. SAME—INJURY BY ACCIDENT—ACTION—BURDEN OF PROOF.**

The burden of proof, in case of injury received in crossing a railroad track on a highway, is upon the plaintiff to show, by a preponderance of evidence, negligence on the part of the defendant or its employees.

**9. SAME—CONTRIBUTORY NEGLIGENCE.**

If a person, in driving a wagon over a railroad crossing, has failed to exercise the proper care, skill, and watchfulness, and a collision with a train occurs, he has contributed to the accident, and no recovery lies, even though negligence be proved on the part of the company or its employees.

**10. SAME—OCCUPANT OF WAGON—HOW AFFECTED BY NEGLIGENCE OF DRIVER.**

The negligence of the driver of a vehicle in crossing a railroad track is the negligence of the occupants.

## 11. SAME—DAMAGES—MENTAL ANGUISH OF RELATIVES.

In actions for damages brought by an administrator against a railroad company for the death of his decedent through the company's negligence, the law does not permit the jury to award damages for the anguish and suffering of the relatives of deceased, but limits the amount to be recovered to the pecuniary loss caused to the estate of the person killed.

## 12. DEATH OF WOMAN—MEASURE OF DAMAGES—FACTS TO BE CONSIDERED.

In estimating the damages in the case of a woman killed by the negligent running of a railroad train, the jury must consider her age at the time of her death, and any other facts established by the evidence throwing light on her ability to earn money, fixing thus the loss to her estate. But the jury must bear in mind, while thus considering, that the sum awarded is given in one sum, and is freed from the uncertainties that surround and affect business life and affairs.

## 13. DEATH OF CHILD—MEASURE OF DAMAGES.

In an action against a railroad company by an administrator for the death of a child, the plaintiff is not entitled to damages accruing prior to the time when such child would have attained his or her majority.<sup>1</sup>

At Law.

*W. H. Foster and G. L. Johnson*, for plaintiff.

*Burton Hanson and W. J. Knight*, for defendant.

SHIRAS, J., (*charging jury*.) J. H. Morris, as administrator of the estate of Martha J. Whitmer, and as administrator of the estate of Floyd Whitmer, and as administrator of the estate of Matie Whitmer, brings three separate actions against the Chicago, Milwaukee & St. Paul Railroad Company to recover the damages which, it is alleged, were caused to the estates of the three persons named, by the death of said persons; they having been killed in a collision between a wagon in which they were riding and a train upon defendant's road, it being claimed by plaintiff that the collision, and consequent death of said persons, was due to the negligence of the defendant. Under the statute law of Iowa, if a person is killed through an accident caused by negligence on part of another, the pecuniary damages caused to his estate by his death may be recovered in a suit by the administrator of his estate; and these actions have been brought under the provisions of this statute by the present plaintiff, as administrator of the estate of the three persons named, it not being disputed that they are dead, and that plaintiff has been legally appointed administrator of their separate and several estates. As the death of the three persons resulted from one and the same accident, and as the right of recovery in each case is based upon the same allegations, the court, for convenience sake, has ordered the three causes to be consolidated for the purposes of this trial before you, and hence all three cases are now submitted to you for your determination.

It appears from the evidence that the collision between the wagon and train in question took place upon Sunday, and some question has been made in regard to the effect this fact might have upon the rights of the parties. If it were true that the railway company had no right to run its train over its road on Sunday, it would be equally true that Mr. Whitmer and his family had no right, so far as the evi-

<sup>1</sup> See note at end of case.

dence shows, to be driving in a wagon along the highway. So far as the rights of the parties that are to be determined in this controversy are concerned, the fact that the collision occurred on Sunday has no effect thereon. The case is to be determined without reference to that fact, upon the issues set forth in the instructions given you by the court, which alone are submitted to you.

Under the laws of this state, the railways and the public highways may be lawfully built, so as to intersect or cross each other upon the same level. The rights, duties, and obligations of the railroads, and of travelers upon the intersecting highways, are mutual and reciprocal. Both parties are charged with the duty of keeping a careful lookout for danger, and the degree of diligence to be exercised on either side is such as a prudent man would exercise, under the circumstances, in endeavoring fairly to perform his duty. At points where the line of a railroad crosses a wagon-road upon the same level, the trains upon the one, and the teams upon the other, have each a legal right to pass over the crossing or place of intersection, and each have the right to require the exercise of due care on part of the other to avoid a collision. From the greater speed of the railway trains, the greater difficulty in stopping the same, and the requirements of public travel thereon, it is not expected that the train shall stop and give precedence to an approaching wagon. It is the duty of the wagon to wait for the train, as the train has the preference and the right of way. What is meant by this is that when a train and a wagon are approaching a crossing at the same time, it is the duty of the wagon to halt, and allow the train to pass over the crossing before going upon the same. In order that the wagon may thus halt in order to give preference to the train, it is the duty of the train to give due warning of its approach, so that the wagon may stop and allow the train to pass. Such warning must be reasonable and timely. The object of the warning is to secure a clear and unobstructed track at the crossing, so that the train may pass in safety, not only as regards itself, but also as to persons lawfully upon the highway. The warning, therefore, should be reasonably sufficient to accomplish the object, and what constitutes reasonable and timely warning depends upon circumstances. A warning that would be entirely reasonable and sufficient under one set of circumstances, may be wholly inadequate under other circumstances. If, at a given crossing, there are obstacles that obscure or interfere with the view along the railroad, or that may prevent the hearing, by those approaching the crossing, of the sound of the coming train, or of the whistle or bell upon the engine, or if a train is being run at a high rate of speed, these facts, or either of them, may require the exercise of greater precautions on part of the railway company in giving warning of the approach of the train than would be required in the absence of such circumstances. What is required of the company is that, in view of the speed at which the train is being run, and of the



nature and surroundings of the crossing about to be passed, such reasonable and timely warning of the coming of the train shall be given as will enable teams and persons upon the highway, by the exercise of due care and watchfulness upon their part, to avoid a collision with the train, and to leave the crossing free and unobstructed for the passage of the train over the same. By the express provisions of the statute of Iowa, it is made the duty of the railway companies to have upon each locomotive used in the state a bell and whistle, and to cause the whistle to be twice sharply sounded at least 60 rods before a highway crossing is reached, and after the whistle is sounded the bell is to be kept ringing until the crossing is passed, and in case of a failure so to do, the company is liable for all damages sustained by any person by reason of the neglect in not giving such warning of the approach of the train. Under this statute it is the duty of the company to sound the whistle and ring the bell, as provided in the statute, at all highway crossings. In addition thereto, the company may be required to take further precautions to give timely warning of the approach of its trains, if, as I have already said to you, the circumstances are such that the sounding of the whistle and ringing of the bell, as provided for in the statute, would not alone be sufficient to give timely warning of the approach of the train.

On the other hand, persons who are about to cross a railroad track are bound, on their part, to exercise ordinary care and diligence to ascertain whether a train is approaching, and the precaution to be taken by them will vary according to circumstances. They know that the crossing is a place of danger; that a train may come by at any moment; and they are bound to make a vigilant use of their senses of sight and hearing in order to ascertain if a train is approaching. If the nature and surroundings of the crossing are such that an approaching train cannot be readily seen or heard, this fact calls for the exercise of greater watchfulness and to taking of greater precaution on part of travelers who are about to cross the track in a wagon. It is the duty of the traveler to use proper care to ascertain whether he can safely pass upon and over the railway track. He is not justified in attempting to pass over the track if a train is approaching the crossing at such a rate of speed as to render a collision possible. In order to ascertain whether he can with safety attempt to pass over the crossing it is his duty to exercise ordinary care and diligence to ascertain whether a train is or is not approaching; and if he fails to do so, and is injured in consequence thereof, he cannot recover therefor, even though the company may also have been guilty of negligence on its part.

In the case now on trial it is not questioned that on the second day of November, 1884, one David W. Whitmer, with his wife, Martha J. Whitmer, his son, Floyd Whitmer, and daughter, Matie Whitmer, was passing in a wagon along the public highway which intersects or crosses the railway track of the defendant at a point about

one mile east of the station of Elwood, in Clinton county, in this state, and that while upon the crossing a collision occurred with a train passing over defendant's road, which collision resulted in the death of said Martha J., Floyd, and Matie Whitmer.

The first and principal questions upon which the parties are at issue, and which you are required to determine, are—*First*, was said collision caused by negligence on part of the defendant company, or of its employes in charge of said train? And, *second*, did the parties in said wagon, by negligence on their part, cause, or aid in causing, said collision?

Upon part of plaintiff it is claimed that the collision was wholly due to negligence on part of the defendant, and its employes in charge of said train; that the train was being run at a high and dangerous rate of speed; that the whistle was not sharply sounded twice, at a distance of 60 rods or more from said crossing, nor was the bell kept ringing from the time the whistle should have been sounded until the crossing was reached; that no sufficient warning of the approach of the train was given; that, owing to a curve in the railway track, persons operating trains thereon cannot see the road-crossing at a distance greater than 300 yards, and that by reason of a growth of weeds and briars upon the side of the track and road, the view of the track and road was obstructed; that in view of the character of the crossing, and the surroundings thereof, proper precautions were not taken by the defendant and its employes to give reasonable and timely warning of the approach of said train; and that, in consequence thereof, the collision occurred, without fault upon part of persons in the wagon. On part of the defendant the several allegations of negligence made against it are denied, and it is further claimed that the collision was caused, in whole or in part, by the negligence of the persons in said wagon, in that the said wagon was driven upon said crossing right in the way of the passing train, without taking proper precautions to ascertain whether a train was approaching, and whether the wagon could with safety be driven upon and over the railway track.

Upon the question whether the collision was caused by negligence on part of the defendant or its employes, the burden of proof is upon the plaintiff, who must satisfy you, by a fair preponderance of the evidence, that the collision was caused by negligence on part of defendant or its employes, before he can ask a verdict at your hands. If, under the evidence in the case, you find that when the train was approaching the crossing where the collision occurred, the whistle upon the locomotive was not sharply sounded twice, when at a distance of 60 rods or more from the crossing, and that the bell was not rung continuously from the place where the whistle should have been sounded, up to the time the crossing was reached; or if you find that either one of these requirements was omitted, and that by reason of the neglect so to do the collision was caused,—then you would

be justified in finding that the charge of negligence against defendant had been made out; for, as I have already said to you, the statute of Iowa expressly provides that the company shall be liable to any one who is injured through the failure to give the signals as required by the statute. If, however, you find that the whistle was sounded, and the bell was rung, as required by the statute, then you cannot find that the company was negligent, unless you are further satisfied by a fair preponderance of the evidence that, under the circumstances of the case, and in the exercise of ordinary care and diligence, the defendant should have taken other and greater precautions to give timely and reasonable warning of the coming of the train, and failed to do so, and by reason of such failure the collision was caused.

Now, gentlemen, you have before you the evidence adduced by both parties, tending to show the speed at which the train approached the crossing, and also the evidence tending to show the nature of the crossing, the respective heights of the railway track and the highway, the surroundings of the crossing as they were when the accident occurred, and what the opportunities were for seeing and hearing the approach of a train upon the railway, and of a wagon upon the highway, and it is for you, under the evidence, to determine what the facts in these particulars were at the time of the collision, and, having determined these, it is then for you to determine whether the defendant and its employes, in view of the facts as you find they then existed, exercised ordinary care and diligence in giving such timely and reasonable warning of the coming of the train as would enable teams and wagons upon the highway to avoid a collision, if those in charge thereof exercised due care and watchfulness upon their part. If, under the evidence in the case, you find that the defendant and its employes failed to give such reasonable and timely warning of the coming of the train as the circumstances required, in the exercise of proper care on part of defendant, and that by reason thereof the collision occurred, then you should find that the charge of negligence against defendant was made out; but, on the other hand, if you are not satisfied by a fair preponderance of the evidence that the defendant or its employes in charge of said train did fail to give reasonable and timely warning of the coming of the train when approaching said crossing, then plaintiff has failed to sustain the charge of negligence against the company, and in that event your verdict must be for the defendant. If, however, you find from the evidence that the defendant was negligent in not giving reasonable and timely warning of the approach of said train, then you will determine whether the person or persons in charge of said wagon were or were not guilty of negligence which aided in causing the collision. If, from the evidence, you find that the negligence of the person or persons in charge of said wagon aided in causing the accident, then the plaintiff cannot recover. If a person who is driving a wagon and team, and, as such driver, has control over the

movements of the wagon, fails to exercise proper care, skill, or watchfulness, and thereby causes or aids in causing an accident, whereby the occupants of the wagon are injured, such negligence on part of the driver is in law deemed to be the negligence also of the occupants, and affects or defeats their right of recovery the same as it does the right of the driver.

The evidence shows, without contradiction, that David Whitmer, the husband of one, and father of two, of the parties killed, was driving the wagon at the time of the accident; and the question, therefore, for determination is whether or not he exercised due and proper care and watchfulness in approaching and attempting to pass over the railway track at the place where the accident occurred. If you find that he did not exercise proper care, but, on the contrary, by his own negligence, aided in causing the accident, then such negligence on his part, as the person in charge of said wagon, will defeat a recovery in any one of these actions. As I have already said to you, it is the duty of every person driving a wagon and team, when approaching a railroad crossing for the purpose of passing over the same, to exercise ordinary care and watchfulness in ascertaining whether a train is or is not approaching, and whether he can safely pass over the railway track; and in so doing he is required to be watchful and vigilant in the use of his senses of sight and hearing. If the highway approaches the crossing in such a manner, and in the midst of such surroundings, that the view of the track is obscured, and it is rendered more difficult to see or hear an approaching train, or the signals therefrom, if given, by the whistle or bell, then the traveler upon the highway, knowing these facts, should use the care and caution commensurate to the increased danger caused thereby. The greater the risk caused by the nature of the approach to the crossing, the greater the watchfulness and precautions that should be taken by the traveler in ascertaining that the way is clear, and that he may with safety undertake to pass over the track. If he fails to exercise the watchfulness and to take the precautions which he should do in the exercise of ordinary care and diligence, in view of his surroundings at the time, and he passes upon the track, and a collision occurs, he cannot recover from the railway company for the injuries he may receive, even though the company is also in fault and guilty of negligence.

You have before you, gentlemen, the evidence showing the nature of the crossing, and the approach thereto; its surroundings at the time of the accident; the opportunities afforded to, or difficulties in the way of, persons driving wagons upon the highway in ascertaining whether a crossing could or could not be safely made; what the obstructions were, if any, tending to prevent those upon the wagon from seeing or hearing an approaching train, or the signals therefrom, if given; and you have also the evidence showing the manner in which David Whitmer and family approached said crossing in said wagon;

and it is for you to say, under the evidence, whether or not said David Whitmer exercised the vigilance and watchfulness and took the precautions which, in the exercise of ordinary care, he should have taken, in view of the circumstances then surrounding him, in order to ascertain whether or not a train was or was not then approaching, and whether he could or could not with safety pass upon the railway track. If you find that he did exercise all the vigilance and watchfulness and take all the precautions that he should have done under the circumstances, then upon this issue you should find for the plaintiff; but if, under the evidence, you find that said David Whitmer failed to exercise the watchfulness and vigilance and to take the precautions which he should have done under the circumstances, and drove said wagon upon the railway track, thereby bringing it into collision with the train, then he was guilty of such negligence as will defeat a recovery in any one of these actions, and your verdict must be for the defendant. To restate the legal propositions briefly: Unless you are satisfied from the evidence that the collision was caused by the negligence of the company or its employes, then your verdict must be for the defendant. If, however, you are satisfied from the evidence that the collision was caused by the negligence of the defendant or its employes, then your verdict should be for the plaintiff, unless you are satisfied from the evidence that the said David Whitmer, as the driver in charge of said wagon, by negligence on his part, aided in bringing about said collision, in which event your verdict must be for the defendant, even though you find that the defendant was also guilty of negligence.

If, then, gentlemen, under the instructions given you, as applied to the facts as you may find them from the evidence, you find for the defendant, you will so say by your verdict; but if you find for the plaintiff, you will then be required to determine the amount of damages to be awarded in each one of the cases submitted to you.

The amount of damages to which plaintiff is entitled, if you find the defendant liable, is such sum as will equal the pecuniary damage caused to the estate of the person killed by his or her death. The statute of Iowa, under which these actions are brought, does not permit you to consider or to award to the plaintiff damages for the anguish and suffering caused to the husband and father of the persons killed, or to their other relatives. The law limits the amount to be recovered to the pecuniary loss caused to the estate of the deceased person, and beyond this amount you cannot go. In estimating the amount of damages you will be required to consider each case separately.

In case No. 254, which is the one brought to recover damages for the death of Mrs. Martha Whitmer, you will take into consideration her age at the time of her death, and any other facts established by the evidence which may tend to throw light upon her ability to earn money, and, exercising your best judgment thereon, fix the damages at such sum as you deem will fairly represent the pecuniary loss

caused to the estate of said Mrs. Whitmer by her death, bearing in mind that the sum you may thus award is to be paid now,—is in one sum,—and will be thereby freed from the uncertainties that surround and affect business life and affairs.

The other persons killed, as the evidence shows, were children of three years, and about 18 months, old. The boy, Floyd, would have become of full age when 21 years old, and the girl, Matie, when 18 years old. Until these children should reach their majority, the father, under the laws of the state, would be liable for their maintenance, and be entitled to their earnings and the benefit of their labor; and hence the proceeds thereof would not belong to their estate, and would not pass to their administrator. In these actions, therefore, the plaintiff, who sues as administrator of their estates, is not entitled to recover for damages accruing prior to the time at which the child would have attained his or her majority. You are therefore to determine what sum should be awarded in each of these cases, as fairly representing the pecuniary loss to the estate, in that the said estate has been deprived by the death of the party of the accumulations or earnings net, after allowing for all expenses, which such party might have accumulated after reaching his or her full age. From the very nature of the case it is impossible that evidence could be adduced showing the amount of such loss. It is impossible to know whether these children, or either of them, would reach the years of their majority. It might be that, had it not been for this accident, and their consequent deaths, they would have reached a full old age. It is impossible to know whether these children, or either of them, had they lived, would, after their majority, ever have earned or accumulated any estate or property whatever. It might be that they would have been successful in that regard, and have accumulated estates of greater or less value. You know, gentlemen, from your common observation and experience, the uncertainties and contingencies that attend human life and the accumulation of property, and due weight should be given thereto in estimating the damages to be awarded in cases of this character. The amount to be awarded has to be and is intrusted to the sound common sense and good judgment of the jury. The amount you award becomes a sum fixed and certain, and when awarded and paid is freed from the uncertainties and contingencies I have named. In these cases, Nos. 255 and 256, you will therefore, if you find for the plaintiff, award in each case such reasonable sum as in your best judgment may be considered to fairly represent the pecuniary loss to the estates, in that said estates have, by the death of said Floyd and Matie Whitmer, been deprived of their possible accumulations after reaching the ages of 21 and 18 years, respectively.

*A Juror.* I failed to understand from the instruction of the law, and would like to know, whether there is any statute that specifies how fast or how slow a train shall go in approaching a crossing.

*Court.* There is no statute law that I am aware of, and no principle of law that the court can lay down to you. The railway company, so far as the law is concerned, as I understand it, are justified in running at any—at such speed as they may deem best in the transaction of their business. They may run a train, if they can in safety, at 50 or 60 miles an hour, or 100 miles an hour if that speed can be reached; but at whatever speed they do run, they must give timely and reasonable warning of the approach of the train, and the increased speed bears upon that question. A warning which would be sufficient if the train was running 5 miles an hour might not be sufficient if it was running 25 or 30 miles an hour.

In the absence of a statute, damages cannot be recovered by a father for negligently causing the death of his minor son. *Sullivan v. Union Pac. R. Co.*, 2 Fed. Rep. 447.

In an action for negligently causing the death of a minor, the proper measure of damages, where the father is the next of kin, is the probable value of the services of the deceased from the time of his death until his majority, less the expense of his maintenance during the same time. *Mayhew v. Burns*, (Ind.) 2 N. E. Rep. 793; *Stafford v. Rubens*, (Ill.) 3 N. E. Rep. 568; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *City of Chicago v. Scholten*, 75 Ill. 468; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; and the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond majority. *Johnson v. Chicago & N. W. R. Co.*, (Wis.) 25 N. W. Rep. 223.

But where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, they will be entitled to nominal damages only. *City of Chicago v. Scholten*, 75 Ill. 468.

---

### PATTERSON and others v. MATER and others.

(*Circuit Court, D. Colorado.* December 31, 1885.)

1. **REPLEVIN—PROCESS FROM STATE COURT—GOODS IN POSSESSION OF MARSHAL.**  
Goods in possession of a marshal cannot be taken in replevin by process from a state court.

2. **SAME—SUIT ON BOND—JURISDICTION.**

Where such a proceeding is attempted, the marshal may sue on the bond in his own name, in the federal court, irrespective of the citizenship of himself and the obligors in the bond, and so may any one beneficially interested in the bond.

3. **SAME—CITIZENSHIP—ASSIGNMENT.**

Where the parties beneficially interested are citizens in a state other than that of the obligors, they may sue in the federal courts, with, and probably without, an assignment.

Motion for New Trial.

*F. M. Hardbrook*, for plaintiff.

*C. I. Thomson*, for defendant.

BREWER, J. I see nothing in the motion for a new trial that calls for hesitation or admits of doubt. The replevin proceedings by De Walt were unwarranted. Goods in possession of a marshal of the United States cannot be taken in replevin by process from a state court. *Freeman v. Howe*, 24 How. 450.

Where such a proceeding is attempted, an undertaking given for the return of the goods may properly be treated as nothing more than a forthcoming bond,—a mere incident to the action in which possession of the goods was taken by the marshal. In such a case the marshal may maintain an action in his own name in the federal court; and this, irrespective of the question of the citizenship of himself and the obligors in the bond. So may any one beneficially interested in the bond. Jurisdiction in these subordinate and ancillary proceedings rests upon the jurisdiction acquired in the original action.

Further, the marshal is a mere nominal party, having no pecuniary interest. The plaintiffs, citizens of a state other than that of the obligors, are alone beneficially interested. As such they may sue in the federal courts, with, and probably without, an assignment. *Browne v. Strode*, 5 Cranch, 303; *Irvine v. Lowry*, 14 Pet. 293; *McNutt v. Bland*, 2 How. 9; *Coal Co. v. Blatchford*, 11 Wall. 172; *Huff v. Hutchinson*, 14 How. 586; *Walden v. Skinner*, 101 U. S. 588.

The motion for a new trial will be overruled.

---

### VAN DE VENTER *v.* CHICAGO CITY RY. CO.

(Circuit Court, N. D. Illinois. May 8, 1885.)

#### 1. STREET RAILWAYS—CABLE CARS—DILIGENCE REQUIRED.

Street railways, as common carriers, are bound to the exercise of a high degree of care and diligence in their business, in the care and protection of the persons and lives of their patrons and passengers; are bound to exercise that high degree of care and diligence in the protection of the persons of its patrons, as is usually exercised by very prudent persons in their own business, under like circumstances, and are liable for injuries resulting to passengers from their negligence or want of such care and diligence.

#### 2. SAME—NEGLIGENCE—INJURY TO PASSENGER ATTEMPTING TO GET ON CARS.

Where a person, without negligence on his part, and while the cars are standing still waiting for passengers, endeavors to go aboard the car, with the intention of paying fare and becoming a passenger, and the conductor of the car, without giving such person reasonable and sufficient time to enter, negligently caused or suffered the car suddenly to start, whereby the person attempting to board the same is injured, the company will be liable.

#### 3. SAME—CONTRIBUTORY NEGLIGENCE.

But where the injury was caused by the person's want of care and prudence in attempting to get on the car while it was in motion; or where his own negligence or want of care contributed in any manner to produce the injury, there can be no recovery.

At Law.

*W. G. & A. T. Ewing*, for plaintiff.

*W. J. Hynes*, for defendant.

BUNN, J., (*charging jury*.) This action is brought by the plaintiff, Eugenia Van de Venter, a citizen of the city of Buffalo, in the state of New York, against the defendant, the Chicago City Railway Com-



pany, a corporation organized under the statutes of the state of Illinois, and a citizen of the state of Illinois, to recover for a personal injury, claimed to have been received by her through the defendant's negligence and want of proper care while the plaintiff was attempting to take one of the defendant's cars at the corner of Wabash avenue and Jackson street, in the city of Chicago, on January 29, 1884. The evidence shows that the defendant corporation was and is engaged as a common carrier in the business of carrying persons in Chicago, by means of street cars known as "cable cars," and propelled and run by steam-power. The plaintiff was, at the time of the accident, a teacher of instrumental music, prosecuting her vocation in the city of Chicago.

The plaintiff claims that on the day in question she had been engaged in the instruction of her pupils at Webber Music Hall, upon Wabash avenue, near the corner of Wabash avenue and Jackson street; that between 4 and 5 o'clock that day, January 29, 1884, she came down to the street from the hall, where so engaged, and attempted to take the defendant's car to go southward on Wabash avenue to her home; that the defendant's train of cars stopped, for the purpose of taking on passengers, opposite to the entrance to the music hall, where the plaintiff was standing, waiting for the train, and that she left the sidewalk, and walked across the street to the rear of the Cottage Grove avenue car, which she wished to take, and where other passengers were about getting on board; that the train remained standing until all the other passengers got on board; that she, the plaintiff, was the last one waiting at that point to take that car; and that after the other passengers had stepped on board the train, and while it was yet standing still, she took hold of the railing of the car with one hand, having upon the other arm a gossamer cloak, and an umbrella in the left hand, and at the same time placed one foot upon the lower step of the platform to the car, and at that moment, and before she had got upon the platform, the conductor of the train negligently caused the train to start without giving her sufficient time to get upon the car, whereby she was thrown upon the ground, and drawn several feet along the street by the side of the car, sustaining injuries to her person. This is substantially the claim which the plaintiff makes, and her testimony is directed to and tends to support the claim.

The defendant's defense upon the trial is that there was no negligence or misconduct on the part of the railway company, or its conductor of the train, in question; that the plaintiff, if injured at all, was injured by means of her own carelessness and want of prudence in attempting to take the car while in motion; and this is, I think, substantially the issue you are to determine from the evidence.

The defendant is a common carrier of persons, and, as such, is bound to the exercise of a high degree of care and diligence in its business, in the care and protection of the persons and lives of its patrons and passengers. It is bound to exercise that high degree of

diligence and care in the protection of the persons of its patrons as is usually exercised by very prudent persons in their own business under like circumstances, and is liable for injuries to its passengers resulting from its own negligence, or want of such care and diligence, without fault on their part.

The law requires in such cases the highest degree of care and diligence which is reasonably within the power of the persons engaged in such business. So that if you should find, upon the whole evidence, that the plaintiff, without fault or negligence on her part, and while the cars were standing still, waiting for passengers—the plaintiff with others—to go on board, she endeavored to go upon the platform of the car, with the intent of going into the car and paying her fare and becoming a passenger upon defendant's train; and that, as she placed her foot upon the step leading to the platform of the car, at the usual place of entering said car, and took hold of the railing of the car with one hand, for the purpose of enabling her to step upon the platform to enter the said car, while the car was standing still for the entrance of passengers, the conductor of the train, at that moment, and without giving the plaintiff reasonable and sufficient time to get upon the platform of the car, negligently caused or suffered the train suddenly to start up before the plaintiff had time to get upon the platform, whereby the plaintiff was thrown upon the ground, and dragged to a distance, causing injury to her person,—the plaintiff in such case would be entitled to recover for such injury. On the contrary, if the jury should believe from the evidence that the injury to plaintiff was caused by her own want of prudence or care in attempting to take the train while such train was in motion, or that her own negligence or want of care contributed in any manner to produce the injury, she cannot recover, and your verdict in such case should be for the defendant.

The case presents, in the main, a question of fact for the jury, and which it becomes your duty to determine from the weight of the evidence. The burden of proof is with the plaintiff to establish her case by a preponderance in the weight of the testimony, and in the trial of the issue it will be the privilege and duty of the jury to consider all the testimony on both sides, and to give to each and all of the several witnesses, and all the facts and circumstances appearing upon the trial, such weight and credit as you think them fairly entitled to. Evidence is that which demonstrates and makes clear to the minds of the jury the issue between the parties, and it is always for the jury to judge how much credit and weight should, in justice, be attached to the statements of the several witnesses. Of course, the number of witnesses testifying to a given state of things for and against is a material circumstance to be considered by the jury. But it does not follow from this that you are necessarily to give more credit to the greater number of witnesses so testifying, as against a less number testifying to the contrary state of facts. If the jury, all

things considered, are more convinced by the testimony of the lesser number, they are entitled to take their testimony in preference to that of the greater number. Still, you are always to consider the number of witnesses testifying for and against. It is also your duty, in giving weight to testimony, to consider the interest of the several witnesses, if any, in the result of the trial, and their relation to and connection with the parties and the case, as well as the statements they make, the reasonableness or unreasonableness of their testimony, and how they are corroborated or contradicted by other testimony or by the known and conceded facts of the case; also the manner of the witnesses upon the stand, their apparent feeling or bias, if any, for or against one party or the other. After full and patient consideration of all the testimony and circumstances, the jury are to consider how they are reasonably satisfied and convinced by the evidence, taken as a whole.

If you find for the defendant, you will simply say so by your verdict. If for the plaintiff, it will then be your duty to assess the damages she will, in such case, be entitled to recover from the defendant on account of the alleged injury.

If you find for the plaintiff, the sources of the damages will be—*First*, the expenses necessarily and properly incurred by her in procuring medical aid and attendance, and for nursing, in consequence of the injury, to be assessed and found by the jury from the evidence; *second*, if you find the plaintiff was disabled by the injury, from attending to her ordinary business and occupation, compensation for her loss of time so occasioned by the injury, to be assessed and found by the jury from the evidence; *third*, the personal pain and suffering, physical and mental, to which the plaintiff has been subjected as a consequence of the injury, to be assessed by the jury from the testimony. The damages which the plaintiff would be entitled to recover under this last head, in case you find for the plaintiff, are largely in the discretion of the jury, but they should be proportioned as near as can be to the extent of the pain and suffering endured by the plaintiff as a consequence of the injury. They should in no case be excessive in amount, but made judiciously commensurate, in the sound judgment and discretion of the jury, to the pain and suffering, physical and mental, so endured by the plaintiff as a consequence of the injury.

There was some evidence on the part of the plaintiff tending to show that the injury to the plaintiff will be incurable and permanent, on account of an injury to the plaintiff's spine; but I think, upon the whole, the jury would not be justified in so finding, and I understand the plaintiff's counsel to waive any claim for damages on the consideration of the injury being permanent or incurable; and so you are instructed, in case you find for the plaintiff, to consider the matter of damages under the three heads only, as enumerated to you by the court, and assuming that the injury is not permanent or incurable.

Gentlemen, the further responsibility of the case now rests with you. You will take it, give the evidence patient and full consideration, and decide the issue according to the justice thereof, as shall appear to you from the evidence.

The jury returned a verdict of \$6,500 for the plaintiff which, upon motion, the court refused to set aside.

---

CURTIS and another v. WORTSMAN.

(Circuit Court, S. D. Georgia, E. D. November Term, 1885.)

1. ATTACHMENT—FRAUD—CLAIMANT—BURDEN OF PROOF.

On a proceeding by attachment against a debtor fraudulently conveying or concealing his property, where a claim is interposed, the rule is the same as to the burden of proof as in other claims.

2. SAME—TRAVERSE AFTER JUDGMENT.

Where a defendant in attachment has not traversed the grounds of attachment after a judgment against the defendant, the claimant cannot traverse.

At Law.

*Charles Nephew West and Wade Hampton Wade*, for plaintiff.

*Garrard & Meldrim*, for claimant.

SPEER, J., (orally.) When this question was presented on yesterday, I had doubt whether or not we were proceeding regularly. It occurred to me that the plaintiff here was to show affirmatively that the property levied on was subject to the attachment by proof of the allegations in the petition, under this section of our Code, it being a new feature in our attachment law. This section (Code Ga. § 3297) provides that whenever a debtor shall sell or convey or conceal his property liable for the payment of his debt, for the purpose of avoiding the payment of the same, or whenever a debtor shall threaten or prepare so to do, his creditors may petition the judge of the superior court of the circuit where such debtor resides, if qualified to act, and, if not, the judge of any adjoining circuit, fully and distinctly stating his grounds of complaint against such debtor, and praying for an attachment against the property of such debtor liable to attachment, supporting his petition by affidavit or testimony, if he can control the same. And the statute further provides that such judge may then grant an attachment in the usual form, and directed as usual, which shall be executed as existing laws provide, subject to existing laws as to traverse, replevy, demurrer, and other modes of defense. It also provides that the judge may, if he deems it more proper under the circumstances of the case as presented to him, before granting such attachment, appoint a day on which he shall hear the petitioner and the party against whom the attachment is prayed as to the propriety of granting such attachment, and, if satisfied upon such hear-

ing that the attachment should not issue, he shall not grant the same.

In this particular case the judge did not give the defendant in attachment an opportunity to show that the attachment was improperly applied for, but granted the attachment. The law enacts that the attachment shall be executed as existing law provides, and the existing law provides that it is subject to traverse, replevy, demurrer, and other defenses. The term "existing laws" means, of course, the laws existing at the time the attachment is sued out. The defendant did not traverse this attachment, and judgment was rendered,—a general judgment on the attachment. Now, the claimant is before the court, and insists that the property levied on is not the property of the defendant, but is hers. She insists, further, that it is not subject to this attachment, and that the plaintiff must show that it is subject as if on the original trial. When the judgment was obtained, unless there had been a traverse filed, the plaintiff would not have been put to the necessity of submitting his proof relative to the grounds of attachment.

The affidavit to the attachment is manifestly considered sufficient proof of the grounds of attachment, unless there is a traverse filed, and if there is a traverse, then the burden of proof is on the plaintiff. *Oliver v. Wilson*, 29 Ga. 642. The supreme court of Georgia have distinctly held that after judgment on attachment the claimant cannot traverse the grounds of attachment, and this concludes the court upon this question. *Foster v. Higginbotham*, 49 Ga. 264. Besides, it is provided in section 3323 of the Code that the claim shall be tried in the same manner, subject to the same rules and regulations, as are prescribed in other cases for other claims. Now, in all other cases, where property levied on is at the time of such levy in possession of the defendant in execution, when the plaintiff proves that fact the burden of proof is shifted upon the claimant. So in this case, the defendant having failed to traverse the grounds of attachment, and judgment having been rendered thereon, the claimant cannot controvert their truth; and, the plaintiff in attachment having shown that the property claimed was in the possession of the defendant at the time of the levy, the burden rests upon the claimant to show title thereto, as in other claims. This remedy has to so large an extent been substituted for the equivalent proceeding in equity, that it is highly important to ascertain and settle in the courts of the United States the best and most efficient practice in its enforcement.

## CARY and others v. DOMESTIC SPRING-BED Co. and others.<sup>1</sup>

(Circuit Court, D. New Jersey. January 6, 1886.)

### 1. PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION.

No new facts appearing from defendant's affidavit, a preliminary injunction was granted in this case, without an examination of the merits or any expression of opinion upon the validity of the patent; following the ruling in *Cary v. Wolff*, 24 Fed. Rep. 139.

### 2. SAME—MOTION TO DISSOLVE PRELIMINARY INJUNCTION.

Upon a motion to dissolve the preliminary injunction, the defendants conceded the utility of the invention, but sought to show by affidavits that the patentee was not the first inventor. The court, not deciding that such evidence was conclusive as to the prior use, held that it was of a character to suggest grave doubts on this point, and dissolved the injunction.

### 3. SAME—RULE AS TO DISSOLVING INJUNCTIONS.

It is a good rule that evidence which would prevent the issuing of an injunction ought to be regarded as sufficient to dissolve one already granted.

In Equity.

*Mr. Collins* and *Mr. Keasbey*, for defendants.

*Mr. Duncan* and *Mr. Witter*, for complainants.

NIXON, J. The validity of the complainant's patent was passed upon and sustained by his honor, Judge WHEELER, in the case of *Cary v. Wolff*, 24 Fed. Rep. 139, pending for several years in the circuit court of the United States for the Southern district of New York. Judge ACHESON, in the Western district of Pennsylvania, followed Judge WHEELER, and granted to the complainant a preliminary injunction. 24 Fed. Rep. 141. An application was then made to this court, in July last, for a provisional injunction, and finding that no facts were revealed by the affidavits which had not been considered by the learned judge in the *Wolff Case*, I ordered the injunction, without an examination of the merits, or expressing any opinion upon the validity of the patent.

The defendants now introduce a number of new affidavits, relating to the novelty of the invention, and move to vacate and dissolve the injunction heretofore granted. They seem to occupy new ground. They acknowledge the value of Cary's alleged invention; concede, as the patent claims, that, in the operation of coiling the wire into springs, the metal is weakened by disturbing the molecules,—the outer portion of the coil being drawn or stretched, and the inner portion crushed or shortened,—and admit that the elasticity and strength, lost by the distortion, is more than restored by subjecting the spring, for a few minutes, to a degree of heat known as "spring-temper heat." They claim, nevertheless, that Cary has been anticipated in the discovery that spiral springs are improved in elasticity by such a process; and that the fact was known, and the process in public use,—by the affidavits,—some years before he claims to have discovered and used it.

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

In considering the application, I have confined myself mainly to the testimony of the three employes of the American Spiral Spring Butt-hinge Company, to-wit, John I. Riker, and John and Joseph R. Pereira.

Mr. Riker says that in 1864 he became the foreman of the American Spiral Spring Butt-hinge Company, then carrying on its business in Jersey City; that they manufactured spiral springs in connexion with butt-hinges; that he was in the continuous employ of the company from 1864 to 1875, either as foreman or superintendent, and was thoroughly acquainted with all its manufacturing operations, and conducted them; that he studied the best means of tempering the springs after they were completed, and early learned that it injured their quality to heat them, beyond a blue color, to a red heat; that for several years he was in the habit, after heating the springs, to plunge them into an oil-bath, supposing that it was necessary in order to impart to them a good, even, elastic temper; but that in the year 1867 or 1868 (certainly before 1870) he had some springs, on which some japan had accidentally dropped, and which he put into the furnace to burn off, and found their quality improved, although he had not cooled them in the oil-bath mixture. "This," he continues, "led us to experiment, and we found that the heating alone caused the increase of elasticity, and that the cooling was not necessary. Therefore, we discontinued the use of the [oil] mixture on the springs, and simply heated them to a blue color, and let them cool off in the air."

John Pereira testifies that he was employed in 1864 as a workman in the same company, while Riker was foreman, and has remained in their employ ever since; that he was familiar with all departments of their business, and at present has the charge of their factory as superintendent. He states in his affidavit the incident to which Mr. Riker refers, from which they learned that the increased elasticity of the spring arose from the mode of heating, and not to the cooling in the oil-bath. He says that some years before 1870, and, as near as he can recall, in the year 1867 or 1868, they put some butts on the oven, with the springs in, to burn off some japan, which had dropped on them, and to his surprise he ascertained that the springs were not ruined, but were better than before. They learned from experiment that heating the springs to a spring-temper heat and to a blue color improved their elasticity, and that such heating was the best process for tempering, and that they have continued such process more or less ever since.

His brother, Joseph, swears substantially to the same effect. He says:

"About 1867, and before the japanning oven was built, we had some springs that got japan on. It was necessary to take off the japan, and so we burned it off by putting them on a plate over the fire. They were heated enough to burn off the japan, and not to a red heat. I supposed that the temper would

be taken out by the heating, but on testing we found that they were improved by the heating, although they had not been dipped in the oil. This led us to experiment, and we heated a lot of soft springs until they were blue, and let them cool off without any bath, and found that they were improved. After this we tempered many of our springs in this way. Sometimes, when the wire was very soft, we put them in the oil mixtures, but generally we left them to cool in the air. This we practiced frequently before the year 1870. I think we began it in 1868, and I am sure it was before 1870. We have continued to practice it ever since on springs requiring tempering."

It does not appear that such testimony of the prior discovery, knowledge, and use of the invention was brought to the notice of either of the learned judges who granted the injunction in the other cases. I do not say that it is conclusive. A cross-examination may throw a different light on the matter. But it is certainly of a character to suggest grave doubts whether Cary was in fact the original and first discoverer of the beneficial results which followed the application of spring-temper heat to springs, whose value so largely depends upon their elasticity and strength. I do not think that I should have seen my way clear to allow the preliminary injunctions in the present case if it had been presented on the original motion; and the rule is a good one, that the evidence which would prevent the issuing of an injunction ought to be regarded as sufficient to dissolve one already granted.

The injunction must be dissolved until the final hearing.

---

### THE PLYMOUTH ROCK.

THE GEORGE H. DENTZ.

### PENNSYLVANIA R. CO. v. THE PLYMOUTH ROCK and THE GEORGE H. DENTZ.

(District Court, S. D. New York. November 12, 1885.)

#### 1. COLLISION—HELL GATE—INSPECTORS' RULES.

The large steamer P. R., having the steam-tug G. H. D. and a tow ahead of her and on her starboard side, exchanged signals of two whistles, by which it was understood that the P. R. should pass the tug in going through Hell Gate. *Held*, that this being a violation of the inspectors' rule 9, which required the P. R. to drop astern in that situation, both vessels were culpable for the violation of the rule; and, the violation not appearing to be immaterial, both were held in fault on that ground for the collision that ensued a little above Flood rock.

#### 2. SAME—STOPPING AND BACKING.

*Held*, further, that the tug was also in fault for going in the middle or to the left of the middle of the stream after such signals, instead of keeping on the right-hand side, as she might have done, to give the P. R. more room;



and that the P. R. was also in further fault for not having stopped and backed in time, as she might have done upon observing the course that the tug was holding.

In Admiralty.

*Wilcox, Adams & Macklin*, for libelant.

*William Hildreth Field*, for the Plymouth Rock.

*Edwin G. Davis*, for the George H. Dentz.

BROWN, J. On the sixth of September, 1884, as the Plymouth Rock was near the upper end of Blackwell's island, in the westerly channel, bound through Hell Gate, in the flood-tide, she observed the steam-tug George H. Dentz, with three boats along-side, near the Astoria ferry, on the Long Island shore, also apparently bound through Hell Gate. She at once gave the Dentz a signal of two whistles, which were immediately answered with a similar whistle. Both pilots, as appears from the evidence, understood this signal to mean that the Plymouth Rock should pass the Dentz on the latter's port side. In attempting to do so the starboard side of the Plymouth Rock came in contact with the libelant's boat, which was on the port side of the Dentz, and did her some damage, for which this libel was filed.

The weight of evidence shows that the place of the collision was in the easterly Hell Gate passage, not far from the Gridiron, just above Flood rock, and between that and Hallett's point. On behalf of the Plymouth Rock, it is claimed that the steamer ran as near the Gridiron as safe, namely, within 20 or 25 feet of it; while the witnesses on the part of the tug testify that the tug, at the time of the collision, was in mid-channel, some 350 feet from the Gridiron.

1. Both vessels must be held in fault for this collision. No place in the harbor requires so careful navigation as the channels through Hell Gate. Rule 8 of the board of supervising inspectors, in effect, forbids steamers attempting to pass each other in going through Hell Gate, in either direction. It provides that "when they shall have arrived abreast of the north end of Blackwell's island, the steamer on the right or starboard hand of the other shall have the right of way, and the steamer on the left or port side of the other shall *check her way and drop astern*." The tide in that vicinity runs about six miles an hour; the Plymouth Rock was, therefore, making by land about 16 miles per hour, and the Dentz about 9 miles. I find, therefore, that when the whistles were exchanged, the Dentz was not far from Astoria ferry, as located by the Plymouth Rock. She therefore had the right of way, and the Plymouth Rock, by the inspectors' rule, was bound to keep astern until the Dentz had passed through this dangerous passage. As the signal exchanged between the two was understood by both, it amounted to an assent on the part of both to depart from the inspectors' rule. As this rule had the force of a statute, (*The B. B. Saunders*, 19 Fed. Rep. 118,) it was binding upon both, and each must be held in fault for the collision which ensued through violating it; unless there were other faults of the one or the

other, so much more important and controlling as to make the latter the proper sole cause of the collision, and the violation of the rule, the remote and immaterial cause only. *The E. A. Packer*, 20 Fed. Rep. 327, 329; *The Maryland*, 19 Fed. Rep. 551, 556.

In this case there were doubtless other faults on both sides, which I shall presently notice. But the evidence does not show with such certainty the precise place of the collision in reference to the turn of the Plymouth Rock to the eastward, as warrants me in holding that the attempt to pass in the narrow and tortuous channel at Hell Gate was immaterial. The large steamer Pilgrim was following up a little astern of the Plymouth Rock. Shortly before the collision she gave the Dentz a signal of one whistle, meaning that she would pass the Dentz on the latter's starboard side, to which the Dentz also assented. This was an additional violation of the same rule of the supervising inspectors, that increased threefold the dangers of the passage. The Pilgrim had been in sight, and the Dentz may possibly have supposed she was bound to leave space for her; and if the Dentz intended to go in mid-channel, so as to leave room for one steamer on each side of her, there was great liability to error of judgment in this attempt.

The duties of these several steamers must, however, be considered in reference to the inspector's rules, as much as to the statutory rules. When the Dentz had agreed that the Plymouth Rock might pass upon her port hand, it became the duty of the Dentz to give ample space by going upon the starboard side of the channel, which was unobstructed, and by keeping on that side all the way around the bend to the right a little above Flood rock, under a port wheel, so as to give the Plymouth Rock, with her great length, room to swing without danger. Instead of doing so, the Dentz, even according to her own testimony, was no further to the right than mid-channel, and was kept heading directly towards the Hog's Back on the northern shore. As she makes the place of collision one-third of the distance towards the Hog's Back, it is not impossible that the collision arose after the Plymouth Rock commenced her swing to starboard.

Considering the testimony of the libellant, who is mainly in the situation of an impartial witness, it is probable that the collision was not as near to the Gridiron as the witnesses for the Plymouth Rock state. But in view of the narrow channel, the sharp turn of nearly a right angle just beyond Flood rock, and the great length of such boats as the Plymouth Rock, I must hold it a culpable fault in the Dentz—*First*, to have assented to any departure from the inspectors' rule; and, *second*, having done so, not to have kept upon the starboard side of the channel-way, directly around Hallett's point, so as to give undoubted room for the Plymouth Rock to make her necessary turn.

2. The Plymouth Rock is also in fault, both for deliberately violating the inspectors' rule, and also for not stopping and backing in

time to avoid the collision, when the Dentz was seen approaching to the westerly half of the channel around Hallett's point. Her pilot claims that when this was observed he could not stop, on account of the currents of that locality. I cannot accept this statement as an excuse. The Pilgrim, just astern of him, was able to stop, and did so without difficulty, and passed the Plymouth Rock some five minutes afterwards. The flood tide, since the removal of the shoals from Hallett's point, runs true between that point and Flood rock. The Dentz, according to the pilot's statement, was seen hauling to the westward after passing Astoria ferry; and the Plymouth Rock had sufficient notice of her course to have kept entire control of herself, or, if need be, to have kept astern of the Dentz, as required by the inspectors' rule, until all danger was past. Both vessels must therefore be held in fault, and a decree for the libellant be rendered against both, with costs.

---

ETHERIDGE v. CITY OF PHILADELPHIA.<sup>1</sup>

(District Court, E. D. Pennsylvania. November 16, 1885.)

1. MUNICIPAL CORPORATION—LIABILITY FOR DEFECTIVE DRAW-BRIDGE—COLLISION—JURISDICTION.

The schooner Elm City had engaged a tug to tow her from Pine street wharf, on the Schuylkill, to Port Richmond. The tug made fast to the schooner and signaled those in charge of defendant's bridge to open the draw to let them in. The draw was opened in response to the signal. The vessels proceeded on their way. There was a high wind blowing at the time. Those in charge of the bridge, owing to its being out of order, were unable to fasten the draw securely. It got beyond their control, swung round, struck and damaged the schooner. *Held*, that the admiralty court had jurisdiction, and that the municipal corporation was responsible for the negligence.

2. SAME—DEFECTIVE BRIDGE—NEGLIGENCE—NOTICE.

When the draw of a bridge is turned to remove obstructions to navigation, it must be securely fastened. Failure to do this is negligence.

In Admiralty.

The cause came up to be heard on libel, answer, and proofs.

*Driver & Coulston*, for libellant.

*McMichael & Warwick*, for respondent.

BUTLER, J. The question of jurisdiction is settled by the following cases: *The Ceres*, 7 Wkly. Notes Cas. 576; *The Plymouth*, 3 Wall. 35; *The Rock Island Bridge*, 6 Wall. 215; *Atlee v. Packet Co.*, 21 Wall. 390; *Railroad Co. v. Steam-boat Co.*, 23 How. 219; *Leathers v. Blessing*, 105 U. S. 626; *The Maud Webster*, 8 Ben. 551.

It is quite clear that the accident resulted from defect in the bridge. When the draw is turned, to remove obstruction to navigation, it is intended to be secured in place by an iron bolt and socket. This ar-

<sup>1</sup> Reported by C. B. Taylor, Esq., of the Philadelphia bar.

rangement is essential to safety, and when employed renders an accident, such as befel the libellant, impossible. On the occasion involved, the provision for securing the draw was out of order, and useless. Had this not been so the accident would not have occurred. The character of the weather, at the time, made the defective condition of the bridge especially important.

That it was the respondent's duty to keep the bridge in repair is not questioned. Failing to discharge this duty, it became liable for the loss thus occasioned. The defect existed for many months. After so great a lapse of time it should have been discovered without notice. The exercise of proper vigilance would have discovered it much earlier. The testimony shows, however, that the respondent was notified of its existence long before the accident. The cases cited by respondent's counsel are inapplicable to the facts here involved.

I find no evidence of contributory fault in the libellant.

A decree must be entered accordingly for the libellant.

---

### THE NEW ORLEANS.<sup>1</sup>

#### NATIONAL BUREAU OF ENGRAVING & MANUF'G CO. v. THE NEW ORLEANS.

(Circuit Court, E. D. Louisiana. December 31, 1885.)

##### 1. CARRIER OF GOODS BY WATER—BILL OF LADING—EXCEPTIONS IN.

An exception in a bill of lading that the carrier shall not be liable for loss or damage from heat is lawful, and is binding on the shipper to the extent that thereby the carrier shall not be discharged from the consequences of his own neglect or misconduct.

##### 2. SAME—BURDEN OF PROOF AS TO NEGLIGENCE OF CARRIER.

The preponderance of American authority is said to be in favor of the rule in England that refuses to presume negligence where none is shown, and considers the carrier is excused upon his showing that the loss arose from a cause for which, according to his contract, he was not to be held responsible.

##### 3. SAME—GOODS NOT SHIPPED ON DECK.

If bill of lading be silent as to mode of storing, goods must be carried under deck; and if goods were carried on deck and lost or damaged, the carrier would not be allowed to prove by parol a consent by the shipper to the deck storage. Hence a notice marked on the goods that they were to be carried on deck, not called to the attention of the carrier, and not mentioned in the bill of lading, ought not to increase the carrier's responsibility.

Admiralty Appeal.

W. S. Benedict, for libellant.

E. W. Huntington, for claimant.

PARDEE, J. The case shows that the damage to the libellant's goods resulted from heat, but does not show how and where the heat origi-

<sup>1</sup>Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

nated, nor who, if anybody, was in fault. The bill of lading stipulates that the carrier shall not be "liable for loss or damage from rats, leakage, rust, *heat*, breakage, or natural decay of goods," etc. Such a stipulation on the part of a common carrier is lawful, and is binding on the shipper to the extent that thereby the carrier shall not be discharged from the consequences of his own neglect or misconduct. In fact, without such stipulation expressed in the bill of lading, "carriers are not liable for losses arising from the ordinary wear and tear of goods in the course of transportation, nor for their ordinary deterioration in quantity or quality, nor for their inherent natural infirmity or tendency to damage; and this rule includes the decay of fruits, the diminution, leakage, or evaporation of liquids, and the spontaneous combustion of goods." See *Lawson, Carr.* 15, § 14, and cases cited in note. "In all such cases where the negligence of the carrier does not co-operate in the loss he will be excused." *Id.*

It being established that the loss in this present case was from heat, and from which the carrier was released by his contract, unless his negligence or misconduct co-operated in the loss, it is important to inquire upon which party is the burden of proof as to that contributing negligence or misconduct. The preponderance of American authority is said to be in favor of the rule in England that refuses to presume negligence where none is shown, and considers the carrier as excused upon his showing that the loss arose from a cause for which, according to his contract, he was not to be held responsible. See *Lawson, Carr.* § 248, p. 373, note for cases. This rule has been laid down by the supreme court of the United States. See *Clark v. Barnwell*, 12 How. 272; *Transportation Co. v. Downer*, 11 Wall. 129.

The burden, then, is on the libellant of showing that the negligence or misconduct of the respondent co-operated in the loss or damage to his goods. The libellant, to support the charge of negligence, contends that the packages of labels contained plain notices, printed in large capitals upon each case, to-wit: "Must not be put in the hold." "This side must be kept up." "Must be kept in a cool place,"—and that in spite of these cautions the packages of labels were stowed in the forward hold, where they were unduly exposed to heat. The proof does not sustain the complaint that the hold where the packages were stowed was an improper place, but, on the contrary, shows that it was the coolest and driest portion of the ship under deck, and where it was usual and customary to stow butter, cheese, and other goods needing a dry, cool place to prevent deterioration.

The rule is well settled that if the bill of lading be silent as to mode of stowing, goods must be carried under deck. See *The Delaware*, 14 Wall. 579. The same case holds parol evidence of an agreement that goods were to be stored on deck to be inadmissible. The bill of lading in this present case shows that the marks and numbers on the packages received were "G. W. Dunbar Sons, New Orleans, La.,"

and no mention is made of other marks or notices. It is very doubtful, therefore, whether parol evidence to show any other marks would be admissible. However, as proof of the said notices as attached to the packages has been made, without objection, it is necessary to determine what effect such attached notices had on the responsibility of the carrier. The proof does not show that the notices were called to the attention of any one of the carrier's agents. In the course of loading and stowing the packages aboard the ship the notices might or might not be seen by the stevedore and freight-handlers. The notice "Must not be put in the hold" is the only one that, under the evidence, it is clear was not complied with.

Under the authority of *The Delaware, supra*, if the case were one where the goods had been stowed above decks, and had been lost or damaged, the carrier would not be allowed to prove by parol the notice, so as to show a consent by the shipper to the deck stowage. No authorities are cited to show what effect should be given such notices when they are not called to the attention of the carrier, and are not referred to in the bill of lading. The conclusion I reach is that, as such notice will not protect the carrier, it should not bind him, and I am satisfied that a notice marked on goods, not called to the attention of the carrier, and not mentioned in the bill of lading, ought not to increase the carrier's responsibility. A decree will be entered dismissing the libel, with costs.

---

CUNNINGHAM and others v. SWITZERLAND MARINE INS. Co. and others.<sup>1</sup>

(District Court, S. D. New York. December 31, 1885.)

1. MARINE INSURANCE — EXPENSES OF LITIGATION — SUE AND LABOR CLAUSE — PREVIOUS SUITS — SEAWORTHINESS OF VESSEL — ESTOPPEL.

Certain insurance companies, in conjunction with cargo owners, defended against a claim on a bottomry bond. The cargo was finally released from the claim. Afterwards, on suit brought by the cargo owners against the insurance companies, under the "sue and labor" clause in the policies, to recover the expenses of defending the bottomry suits, the company set up the unseaworthiness of the vessel, which they had not utilized as a defense in the previous suits. It appearing that such a defense would not have availed in the former suits, and that in part, at least, at the time of the former litigation the condition of the vessel was unknown to the companies, and that libelants were not misled in any way by the former assistance of the companies, *held*, that the companies were not estopped in this litigation from using such a defense, nor was there anything in the above facts to prevent an inquiry in this suit into the question of unseaworthiness.

2. SAME — UNSEAWORTHINESS OF VESSEL — POLICY OF INSURANCE.

The evidence showing that there were facts tending to indicate unseaworthiness, unless explained, and no explanation being offered, *held*, that, as

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

the vessel was unseaworthy when she sailed, the policies of insurance never attached, and cargo owners could not recover of the insurance companies the expenses of defending the former suits.

In Admiralty.

*Wheeler & Souther*, for libelants.

*Butler, Stillman & Hubbard*, for respondents.

BROWN, J. The above libels were filed by cargo-owners to recover the expenses of defending a suit on a bottomry bond, under the "sue and labor" clauses of certain policies of insurance issued by the respondents upon the cargo of the *Julia Blake*, from Rio to New York. On the voyage the vessel put into St. Thomas, where extensive necessary repairs were made, in order to procure which a bottomry bond was given to the Bank of St. Thomas upon her hull and cargo. The vessel with her cargo uninjured, subsequently arrived in New York. The vessel, freight, and cargo were thereupon libeled for the enforcement of the bottomry bond. Practically no defense in that suit was made as respects the ship and freight. The controversy as regards the cargo was carried to the supreme court. The decisions of this court and of the circuit court were there affirmed, and the cargo released on the ground that no communication was had with the owners of the cargo prior to executing the bottomry bond. *The Julia Blake*, 16 Blatchf. 472; S. C. 107 U. S. 418; S. C. 2 Sup. Ct. Rep. 692.

At first the insurers employed proctors and counsel to defend against the claim on bottomry. They appeared for the owner of the vessel, and answered in behalf of the owner; and also as agent or carrier, in behalf of the cargo. Some months afterwards the libelants, owners of the cargo, themselves intervened and answered separately by proctors and counsel of their own; and, after the decree in the district court, they represented mainly, if not solely, the interests of the cargo in that suit. The insurance companies had previously agreed to pay any sum which might be fixed by the average adjusters as general average. The libelants now sue for their expenses and counsel fees in that litigation.

In the present action the respondents have set up in defense the unseaworthiness of the vessel when she left Rio, and allege that the policies consequently never attached. As the claim in suit rests upon the stipulations of the policies only, there can be no recovery if the policies never attached, nor became operative as respects the cargo. It is urged that this defense ought not to be regarded as made in good faith, because no such ground was taken in the previous litigation, and because the insurance companies did not act upon that theory; but during the progress of the action in the district court, at least, were active in defeating the bottomry bond upon other grounds. Two answers are given to this contention that I think are sufficient. No issue of unseaworthiness would have been material in the former action. On the contrary, the more unseaworthy the ship the greater would be

her need of repairs at St. Thomas, where the bottomry bond was executed. The facts affecting the question of the seaworthiness of the ship at Rio were not at first known to the insurers. When they were, in a measure, apprised of the facts, the counsel of the insurers stated to the libelants that these facts raised a question concerning their liability as insurers, although not material in the pending litigation. But that merely afforded to the insurance companies an additional ground of defense as insurers of the cargo. Considering the difficulties of establishing that defense before a jury, the insurance companies could not be considered as wholly indifferent whether the claim on bottomry was defeated upon another ground. The assistance of the insurance companies in the former litigation for a time, in no way misled the libelants, or induced them to incur any expense which they would not otherwise have incurred. There is no element, therefore, of estoppel in the case; nor do I find anything in the circumstances that precludes an inquiry into the seaworthiness of the vessel, which is for the first time presented in this suit. On that point the evidence of the master, whose deposition was taken in this suit, but who was not examined in the former suit, is very strong, and shows clearly that the vessel was grossly unseaworthy when she sailed. There are several considerations which suggest a suspicion of great exaggeration in the master's testimony; but, after making all possible allowances for such exaggeration, the undisputed facts concerning the condition of the vessel when she arrived at St. Thomas, and the absence of any severe weather on her passage, would seem to necessitate the inference that she was unseaworthy when she left Rio. When sailing in only a fresh breeze, as it would appear, first her topmast, and then her cross-trees, gave way and fell down, and portions of the foremast were carried away. The testimony is that they were exceedingly rotten, and many parts of the hull were in a similar condition. Such extraordinary accidents require explanation, or the vessel must be held to have been unseaworthy when she sailed. No explanation was given; and it is not suggested that a satisfactory explanation through any extraordinary weather, or other cause, could be proved. I am obliged to hold, therefore, that the vessel was unseaworthy when she left Rio; that the respondents never became liable upon the policies; and, consequently, that they are not answerable for the expenses claimed. The libel is therefore dismissed, with costs.



*In re Estate of McCLEAN, Jr., Deceased.**(Circuit Court, W. D. Pennsylvania. December 14, 1885.)*

## 1. REMOVAL OF CAUSE—SEPARABLE CONTROVERSY.

Where the subject-matter of the suit is a testamentary trust, all the beneficiaries, by themselves or their guardians, being joint exceptants to the trustee's account, the purpose of the proceeding being the enforcement of the trust,—the preservation of the trust-estate, and its due administration,—held that, as between one of the exceptants and the trustee, there was no separable controversy under the removal act.

## 2. SAME—CITIZENSHIP OF GUARDIAN.

Upon a question of the right of removal, the citizenship of the guardian suing, and not that of his ward, is the test of jurisdiction.

Motion to Remand the Cause to the Orphans' Court of Allegheny County.

*S. A. McClung*, for the motion.

*Wm. A. Stone*, *contra*.

ACHESON, J. Undoubtedly, in resolving the question of jurisdiction, regard must be had to the state of the record as it was when the petition for removal was filed. But, discarding the subsequent order of the state court, how stands the case in respect to the parties? On the one side we find Mrs. Susanna McClean, A. J. Pentecost, guardian of Harry McClean, a minor, and William H. Parsons, guardian of Florence H. McClean, a minor, and on the other side Abdiel McClure. Now, according to the allegations of the petition for removal, all these parties are citizens of the state of Pennsylvania, except William H. Parsons, and his ward. Is there disclosed, then, in the suit "a controversy which is wholly between citizens of different states, and which can be fully determined as between them?" For the proper solution of the problem we must consider the subject-matter of the suit, and this we discover to be a testamentary trust; Mrs. McClean and the two named minors being the beneficiaries, and Abdiel McClure the trustee. In the state court Mrs. McClean and the guardians of the two minors joined in filing exceptions to the account of the trustee. The object of the proceeding is the enforcement of the testamentary trust,—the preservation of the trust estate, and its due administration. Now, certainly, all the beneficiaries are directly interested in the relief sought, and the presence of all the named parties would seem to be necessary for full and complete redress. *Winchester v. Loud*, 108 U. S. 130; S. C. 2 Sup. Ct. Rep. 311. I am, then, of opinion that there is here no separable controversy, within the meaning of the removal act, between William H. Parsons, guardian of Florence H. McClean, and the testamentary trustee.

Nor would the case be removable were the proposed amendment (averring that the minor, Harry McClean, is a citizen of the state of New York) allowed; for not only would the citizenship of Mrs. Mc-

Clean remain as an obstacle to a removal, but the question of jurisdiction is to be tested by the citizenship of Pentecost, the guardian, and not by that of his ward. *Coal Co. v. Blatchford*, 11 Wall. 172.

The suit must be remanded to the orphans' court of Allegheny county, and it is so ordered.

---

BRUTTEL, Adm'r, etc., v. CHICAGO, M. & ST. P. RY. CO. and another.

(Circuit Court, N. D. Iowa, E. D. November Term, 1885.)

REMOVAL OF CASE FROM STATE COURT—SEPARABLE CONTROVERSY.

In an action under the laws of Iowa by an administrator against a railroad company and the engineer of one of its engines, to recover damages for the death of his decedent, a fellow-servant of such engineer, there is such a separable controversy as entitles one of the defendants, if a resident of another state, to a removal of the cause to a United States court, under the act of 1875, as construed in *Ayres v. Wiswall*, 112 U. S. 187; S. C. 5 Sup. Ct. Rep. 90.

Motion to Remand Cause to State Court.

*Crane & Joerus*, for plaintiff.

*W. J. Knight*, for defendants.

SHIRAS, J. In the petition filed in this cause, in the district court of Dubuque county, it is averred that plaintiff is the administrator of the estate of Alvis Fink, deceased; that the Chicago, Milwaukee & St. Paul Railway Company is a corporation engaged in operating a line of railroad extending northwardly from Dubuque to the station of Specht's Ferry; that the defendant Emsley was, in November, 1883, an engineer in the employ of the railway company, engaged in running a passenger train on said company's road; that on or about November 29, 1883, said Alvis Fink was in the employ of the said railway company as a night track watchman; and that, while engaged in the performance of his duty as such watchman, "the said defendants, while operating and running a passenger train over the defendant company's road, did carelessly, negligently, and wrongfully run said train of cars upon and against Alvis Fink," and thereby caused his death, to the damage of his estate in the sum of \$10,000, for which amount the plaintiff, as administrator of the estate of said deceased, prays judgment against both defendants. Separate answers were filed by the defendants; and thereupon the railway company filed, in proper time and form, a petition and bond for the removal of the cause to this court, averring that plaintiff and the defendant Emsley were citizens of Iowa, and the railway company was organized under the laws of the State of Wisconsin; and further averring that in the cause there was embraced a separable controversy between plaintiff and the railway company. The state court granted

the prayer of the petition, and ordered the cause to be removed. Upon the filing of the record in this court, the plaintiff moved for an order remanding the case, on the ground that the cause of action declared on in the petition was joint and not separable, and that consequently this court had not jurisdiction, for the reason that the plaintiff and the defendant Emsley were citizens of the same state.

In *Ayres v. Wiswall*, 112 U. S. 187, S. C. 5 Sup. Ct. Rep. 90, it is decided that—

“The rule is now well established that this clause in the section refers only to suits where there exists a separate and distinct cause of action, on which a separate and distinct suit might have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of different states on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun.”

In *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, S. C. 3 Sup. Ct. Rep. 735, it is held that, if several defendants are sued jointly in a state court upon a joint cause of action arising upon contract, and separate answers are filed tendering separate issues for trial, this does not divide the suit into separate controversies, within the meaning of the last clause of section 2, act 1875.

In *Carson v. Tvedt*, 115 U. S. 41, S. C. 5 Sup. Ct. Rep. 1034, 1161, the same principle is applied to a joint action in tort. In that case it was averred in the petition filed by plaintiffs that the defendants, confederating together with the malicious design entertained by them of injuring plaintiffs and breaking up their business, did cause an action in attachment to be brought without probable cause; and, by direction of defendants, the writ of attachment was levied upon plaintiffs' stock in trade, and their business was destroyed. The defendants Wood & Stiles answered, averring that they were attorneys, and had acted under the instructions of their clients, Carson, Pirie & Co. The latter averred that they had caused the issuing and service of the writ, and filed a petition for the removal of the cause into the United States court. The question of the right of removal was carried to the supreme court, and in the opinion, after citing the ruling in *Louisville & N. R. Co. v. Ide*, *supra*, it is held that—

“We are unable to distinguish this cause in principle from that. There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all of the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of defendants only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract.”

In *Starin v. Mayor of New York*, 6 Sup. Ct. Rep. 28, it is ruled "that a separate defense by one defendant in a joint suit against him and others, upon a joint, or a joint and several, cause of action, does not create a separate controversy, so as to entitle that defendant, if the necessary citizenship exists as to him, to a removal of the cause, under the second clause of section 2 in act of 1875."

The rule deducible from these authorities is that, in all actions, whether in tort or upon contract, wherein the liability of the defendants is joint, or joint or several, the plaintiff may, by declaring against all jointly, present in his petition only one cause of action, and, in such case, the defendants cannot, by tendering separate issues in their answers, claim that thereby separable controversies are involved, so as to entitle one or more of the defendants to remove the cause under the second clause of section 2 of the act of 1875. The right of removal turns upon the question whether the plaintiff, by the averments of fact in his petition, shows that he bases his action upon a cause which is joint, or may be made so, at the option of plaintiff, against all defendants, and that plaintiff has, in the latter case, elected to declare against all the defendants jointly. If the averments of the petition show that the cause of action is joint, or, being joint and several, has been declared on as joint by the plaintiff, then the cause is not removable unless all the defendants are citizens of a state other than that of which plaintiff is a citizen. If, however, the facts averred in the petition show that the plaintiff has united therein more than one cause of action, and that the same can be so separated as to present a controversy between citizens of different states, which can be fully determined without the presence of the other parties to the suit, then the cause may be removed. The mere fact that the plaintiff may have the right to make several parties defendants in the same action does not settle the question whether the petition presents separable controversies. Thus, under the code system of pleading, it is permissible to unite in one action, as defendants, the maker, indorser, and guarantor of a promissory note, yet it would hardly be claimed that the action against them was a joint action in the sense in which that term is used in the cases just cited. The liability of the guarantor or indorser is based upon a different obligation or contract from that of the maker of the note, and, although both may be made defendants in the same action, yet they are defendants to different causes of action, in the proper legal sense of that term. The cause of action is a breach of contract, or a tort committed by the defendant. This is not to be confounded with the injury resulting therefrom, nor with the remedy provided by law for the benefit of the party injured in person or property. In a suit against the maker of the note, the cause of action is the breach of the contract to pay the amount of the note at maturity. This is a contract absolute and unconditional. The injury to plaintiff is the result of the breach of the contract on part of the maker of the note, and is made good by award-

ing damages to plaintiff, and the remedy is the judgment and the execution for the collection thereof. In a suit against the indorser or guarantor of the note, the cause of action is the breach of the contract of the indorser or guarantor, which is not a contract absolute to pay the note. It is a conditional contract, wholly separate and distinct from that of the maker. A breach of the contract by the maker does not create a breach on part of the indorser or guarantor.

In the cause now before the court, as against the defendant Emsley, the case on part of plaintiff would be made out by proof that said Emsley, having charge and control of the train, negligently ran the same over the deceased, thereby causing his death. As against the company, it would be necessary to show that the train upon its road, while under the control of the employes of defendant, was negligently and carelessly run over the deceased, causing his death; and that the company had been guilty of negligence in the selection of incompetent employes, or in failing to furnish proper appliances for the management of its trains; or that the deceased came within the provisions of the statute of Iowa making railway companies liable to a certain class of employes for injuries caused by the negligence of co-employes.

In the case of the engineer, he is charged with liability by reason of his own personal negligence, resulting in injury to another. In the case of the company, it is charged with liability by reason of its relation of master or employer. If the deceased does not come within the protection of the Iowa statute, then the fact that Emsley was negligent would not alone fasten liability therefor upon the company. If the liability upon part of the company arises by reason of the statute of Iowa, then the liability of the company, and of the engineer, are not based upon the same legal grounds, nor will the same evidence sustain a recovery against both.

If demurrers had been interposed to the petition filed in this cause, presenting the question whether the facts averred showed a cause of action against the defendants, it is apparent that the legal questions thereby raised would not be the same in the case of both defendants.

As against the defendant Emsley, the facts alleged are that he was in control of the train as engineer, and that he negligently ran the same over the deceased; the legal cause of action thus charged being the violation of the duty of Emsley to use ordinary care in the running of the train, the same being under his personal control.

As against the railway company, the facts alleged are that the deceased was in the employ of the company as a night watchman; that the defendant Emsley was in the employ of the company as engineer, having charge of a certain train upon defendant's road, which train was negligently run over the deceased, while the latter was in the performance of his duty as an employe of the company. The cause of action thus charged against the company may be based upon either one of two grounds: (1) A violation of the common-law duty

of the master to use due care in the selection of competent servants, and in furnishing them with all the proper and suitable means and machinery for the safe performance of the duties intrusted to them, the performance of which duty will relieve the master from liability to an employe who receives an injury by reason of the carelessness of a co-employe engaged in the same service; or (2) a liability under the statute of Iowa, which enacts that railway companies shall be liable to such of their employes as are engaged in the operating of the railroad for the injuries caused by the negligence of a co-employe. If the action against the company is based upon the first ground, it is apparent that the fact that the engineer was guilty of negligence in the running of the train which would constitute a cause of action against him, would not alone show a violation of duty on part of the company. If based upon the liability created by the statute, it is equally clear that the ground of action is distinct and separate from that charged against the engineer.

Under the allegations of the petition, in order to entitle plaintiff to recover against the defendant Emsley, it must be shown that he himself was guilty of negligence in the management of the train under his charge, resulting in injury to the deceased. Failing in proof of personal negligence on part of the engineer, plaintiff could not recover against him, but that would not entitle the company necessarily to a verdict in its favor. In the petition it is expressly charged that the defendants, "while operating and running a passenger train over the defendants' road, did carelessly, negligently, and wrongfully run said train of cars upon and against Alvis Fink." In legal effect, this charges that the defendant company negligently and carelessly ran said train of cars; and, under this allegation, it is open to plaintiff to show negligence on part of any employe of the company in the running of said train; and if negligence on part of a flagman, or on part of the conductor, train dispatcher, or road-master, in connection with the running of said train, could be proven as a matter of fact, and that such negligence was the proximate cause of the death of deceased, then the plaintiff could recover against the company, but not against the engineer.

Under the averments of fact in the petition, two controversies are presented,—one between plaintiff and the defendant Emsley, and one between plaintiff and the defendant company. In the controversy between plaintiff and Emsley, the company has no part nor lot. It has no legal interest therein; and, if the plaintiff and Emsley were citizens of different states, the latter could remove the action, even if the company and plaintiff were citizens of the same state. In the controversy between plaintiff and the company, Emsley has no legal interest. The cause against the company not only can be separated, but must be separated, from that against Emsley, because the grounds of liability are legally different. Although the case may be tried as one before the same jury, the issues upon which the liability of the

defendants depends are different, and cannot be made the same by any form of averment in the petition. According to the rule laid down in *Ayres v. Wiswall*, *supra*, there is involved a separable controversy, justifying the removal of the cause to this court, under the act of 1875.

Motion to remand is therefore overruled.

---

WESTERN UNION TEL. CO. v. BALTIMORE & OHIO TEL. CO.

(Circuit Court, S. D. New York. December 24, 1885.)

1. INJUNCTION—PRIVATE LETTERS—WHEN OPPOSING PARTY ENTITLED TO PUT IN EVIDENCE.

Where a party seeking to procure an interlocutory order uses documents or letters in the affidavit therefor, at any subsequent stage of the action, the opposing party will be entitled to introduce such letters or documents in evidence against the party who originally used them.

2. SAME—CORPORATIONS—LETTERS OF THE OFFICERS OF.

A corporation can speak or act only through its officers or agents, and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent as against the company.

3. SAME—CONFIDENTIAL COMMUNICATION—LETTER OF CORPORATION'S ATTORNEY.

Where a corporation has produced in evidence fragmentary parts of the letters of its attorney, written to the other officers of the company, it cannot be allowed to shelter itself behind the privilege to insist upon the privacy of the communications. By introducing any part it surrenders its privilege as to the whole of such letters.

In Equity.

*Dickerson & Dickerson*, for complainant.

*Frederick H. Betts*, for defendant.

WALLACE, J. Upon a motion in this cause for a preliminary injunction one of the questions involved was whether the reissued patent upon which the suit is founded was obtained for the legitimate purpose of correcting mistake or inadvertence in the specification and claims of the original, or whether it was obtained merely for the purpose of expanding the claims of the original in order to subordinate to the reissue certain improvements or inventions made by others intermediate the grant of the original and the application for the reissue. To fortify its theory of the true reasons for obtaining the reissue the complainant upon that motion embodied in affidavits then used extracts from communications made by Mr. Buckingham, a patent expert and attorney in the office of the general solicitor of the complainant, to the president and the vice-president of the complainant, when the subject of applying for a reissue was under consideration by the officers of the complainant, and while the proceedings for a reissue were pending. The cause has proceeded to the taking of proofs for final hearing, and the defendant now wishes to introduce in evidence

the original communications, extracts of which were thus used by the complainant upon the motion for an injunction. The defendant insists that the parts of the communications which were not disclosed have an important bearing upon the history of the application for a reissue, and indicate that it was not made for any legitimate purpose. The complainant resists this application upon the ground that the communications are privileged as made to its officers by its attorney.

It is entirely clear that the defendant is entitled to put in evidence any document or affidavit which has been used by the complainant in any proceeding in the suit for the purposes of interlocutory relief. By the production of such documents or affidavits as the basis for relief sought, the complainant has impliedly vouched for the truth of the facts recited in them, and they are admissible as the declarations of the complainant. It is well settled that if a party upon a motion in the cause, or for the purpose of obtaining any relief, produces a document or uses the affidavit of another person, the document or affidavit is on any subsequent occasion in the suit admissible as evidence against him who so used it. Such an affidavit may be used upon the trial when the person who made the affidavit is present in court and is not called. *Phil. Ev. (5th Amer. Ed.) 368*. Thus, in *Brickell v. Hulse*, 7 Adol. & E. 454, an action in trover, the defendant used the affidavit of one White to obtain the extension of time. Upon the trial the plaintiff relied upon this affidavit to prove conversion by the defendant. Upon a motion for a new trial the evidence was held to be competent upon the ground that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him, and is equivalent to a statement made by the party himself. See, also, *Gardner v. Moult*, 10 Adol. & E. 464; *Johnson v. Ward*, 6 Esp. 47.

Irrespective of the circumstance that the complainant has made these communications competent evidence for the defendant by its own act, they would be admissible as part of the history of the application for the reissue. They belong to a series of oral acts which took place between the complainant's officers and agents upon the proceeding to surrender the original patent and obtain a reissue. A corporation can only speak through its officers and agents, and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation. The complainant's counsel have evinced their opinion of the relevancy and materiality of the evidence by introducing it upon the motion for the injunction.

The question, then, is whether the complainant can shelter itself behind its privilege to insist upon the privacy of the communications between its attorney and its other officers as confidential communications, when it has itself produced fragmentary parts of them, and sought to use them as a weapon against the defendant to obtain the



stringent remedy of a preliminary injunction. Assuming that the communications addressed to the president and vice-president of the complainant by Mr. Buckingham were communications made to the complainant by its attorney, and as such privileged at the option of the complainant, it was competent for the complainant to waive its privilege. It would hardly be contended that the complainant could introduce extracts from these communications as evidence in its own behalf for the purposes of a final hearing, and yet withhold the other parts if their production were required by the defendant. A party cannot waive such a privilege partially. He cannot remove the seal of secrecy from so much of the privileged communication as makes for his advantage, and insist that it shall not be removed as to so much as makes to the advantage of his adversary, or may neutralize the effect of such as has been introduced. Upon principle it would seem that it cannot be material at what stage of the proceedings in a suit a party waives his right to maintain the secrecy of a privileged communication. All the proceedings in the cause are constituent parts of the controversy, and it is not obvious how any distinction can obtain as to the effect of waiver when made by a party for the purpose of obtaining temporary relief and when made by him to obtain final relief. It is therefore held that the defendant is entitled to introduce the communications of Mr. Buckingham in evidence.

---

JOHNSTON and others v. STRAUS and another.

(Circuit Court, E. D. Virginia. November 27, 1882.)

1. PARTNERSHIP—INSOLVENCY—RETIRING PARTNER—CREDITORS' BILL.

Where the insolvency of a firm is self-proclaimed, and one partner, Iseman, for a pecuniary consideration, and the undertaking of the other partner, Straus, to pay the debts of the firm, retires from the concern, leaving all the social goods, claims, and choses in action in the possession of Straus, who proceeds to sell and collect, and advertises in a public newspaper that the firm has been dissolved, and that he will continue in the same business, and settle the debts of the concern, *held*, that here was a transfer of the partnership effects from the firm to Straus; such a transfer as gave to creditors at large of the firm a right to file a bill in equity under the authority of section 2 of chapter 175, p. 1126, of the Code of Virginia, (1873,) which authorizes suit to be brought before judgment is obtained or execution levied or returned.

2. SAME—EQUITY JURISDICTION.

*Held*, upon the proofs in this case, that jurisdiction in equity attached independently of the charge of actual fraud; that it attached on other grounds, on which *per se* equity may proceed, viz., on the right of creditors and of the members of the partnership to an account; also on the ground of the trust imposed upon Straus resulting from his holding effects which had been the subject of a *voluntary* transfer from the firm to himself; and also on the ground of constructive fraud in the transfer by the firm of the partnership effects to Straus.

3. SAME—MOTION TO DISMISS.

*Held*, that after answer filed, full proofs taken, and final argument of counsel, final hearing by the court, and a decision of the principles of the case, it

was too late to move for dismissal for want of jurisdiction, on the ground that no one of several complainants in the bill held a matured claim against defendants amounting to \$500; it appearing from the bill that each complainant held other claims not yet payable, making, with those due, more than \$500, none of which were disputed by the defendants, who were confessedly insolvent.

4. STATE LAWS—CONSTRUCTION BY STATE COURTS—FEDERAL COURTS.

Where the law of a state determines the rights of suitors and those rights come before a federal court, either in a case at law or in equity, for adjudication, that court is bound to accept such exposition of the meaning of the state law as the court of last resort of the state has given it.

5. SAME—SETTING ASIDE VOLUNTARY TRANSFER.

Accordingly, in a suit in equity in a federal court, founded upon the second section of chapter 175 of the Code of Virginia, which gives the right to a creditor at large to file a bill for setting aside a voluntary transfer of property, and seems to give a lien to the suing creditor, on defendant's estate, from the date of the filing of the bill, which effect it had been decided to have by the supreme court of appeals of Virginia, *held*, that the federal court must respect the lien so declared to exist, and distribute the fund in its hands according to the priority attaching to it, rather than by the rule of *pro rata*.

In Equity.

*John A. Coke*, for complainants.

*Meredith & Cocke*, for defendants.

HUGHES, J. David Iseman and C. E. Straus were wholesale liquor dealers in Richmond, Virginia, under the firm name of Iseman & Straus. Their capital in trade originally put in was \$6,000, and wholly borrowed. They were, according to the first arrangement, to furnish equal amounts of capital; but in the result Iseman put in \$4,000, and Straus \$2,000. Their business was commenced on or about February 1, 1881. On the seventh or fourteenth day of that month they reported to the agent of the mercantile agency of R. G. Dun & Co. as follows, as testified to from memorandum made at the time by T. Scarlett, Dun & Co.'s agent:

"FEBRUARY 14, 1881.

"New firm composed of David Iseman, formerly salesman for L. Stern & Bro., this city, and Chas. E. Straus, who formerly conducted the clothing business here. They state that they have a capital of \$6,000 to \$8,000 in their business, equally contributed; that Iseman has an interest in a farm in Louisa county, Virginia, worth about \$600, and has besides outside means of some \$2,500. Iseman formerly did business in Spottsylvania county, Virginia, where he owns a farm, but it does not stand in his name, consequently it is not liable for his debts. Refer to Planters' National Bank and L. Stern & Bro., Richmond, Va."

Ball, agent of Bradstreet's Mercantile Agency, reported as of the third February, 1881, from information derived from one of the firm, as follows:

"C. E. Straus states: 'We are just commencing, and have a cash capital of \$6,000, equally contributed. Iseman is worth \$3,000 or more. Straus borrowed \$2,000, and had \$1,000 of his own.'"

About a year afterwards, say February, 1882, these agents called again, and the firm reported their condition as about the same as before. Eight months later there appeared in the Richmond news-

papers, of the morning of September 27, 1882, the following announcement:

"RICHMOND, VA., September 25, 1882.

"DISSOLUTION. The copartnership heretofore existing between us, under the style of Iseman & Straus, is this day dissolved by mutual consent. C. E. Straus assumes the liabilities of the old concern, and is authorized to collect all debts due it.

DAVID ISEMAN.

"CHARLES E. STRAUS.

"I take this opportunity to inform my friends that I will continue the wholesale liquor business at the old stand of Iseman & Straus, 1302 Cary street, and solicit a continuance of their kind patronage.

"C. E. STRAUS."

There were no articles of dissolution executed by the partners. A paper signed by the two, as above published, was the only writing executed on the occasion of the dissolution. But it is shown by evidence that Straus executed his individual notes for \$4,000, indorsed by his mother, to Iseman, as an inducement to Iseman's retirement from the firm. There was no formal transfer of the stock of goods, held at the time of the dissolution, from the firm to C. E. Straus, who remained in custody and possession of the goods. There was no formal assignment of the debts due the concern from the firm to C. E. Straus, who did in fact take charge of all collections, and did collect, it seems, some \$1,100.

A few days after the dissolution, C. E. Straus wrote the following circular letter, in manuscript, to the creditors of the firm; those few passages being italicized by me, which indicate that there had been a transfer of property and effects of the firm to Straus, and that he regarded them as his own property held in common with his individual real estate and other means:

OFFICE OF ISEMAN & STRAUS,  
WHOLESALE LIQUOR DEALERS, AND DISTILLERS' AGENTS,  
1302 CARY STREET.

RICHMOND, VA., September 28, 1882.

*Messrs. Frieberg & Workum*—GENTS: I have already notified you of the fact that the firm of Iseman & Straus dissolved on the twenty-fifth of September, *that I have taken the stock and debts due the concern*, that I am to pay off all the debts due by the concern, and that I propose to run the business in my own name. I deem it proper to state to you that the dissolution was caused by the failure of my former partner to attend closely and properly to his department of the business; and that, owing to this neglect on his part, the business of the concern has become very much involved, and has sustained heavy losses. The object of my letter is to ask your indulgence until I can get in such a condition as to pay off all creditors in full without being forced to close up *my business at a sacrifice to my creditors and myself*. Inclosed you will find a statement of *my liabilities and assets*, from which you will perceive that my liabilities amount to about \$29,000, and that *my real estate, stock, and good debts*, at their full value, would not realize more than about \$23,000.

Now, if I can succeed in securing from you and my other creditors an extension of 6 and 12 months, for which I propose to give my notes, with legal

interest added, then I will be able, by careful and judicious management of my business, to pay up in full.

On the other hand, should my creditors insist on an immediate would feel then I *would be forced to make a deed of assignment*, in which I settlement, it my duty to *prefer* my accommodation indorsers to the amount of \$10,000. The net value, after paying the costs of selling under the deed of assignment and the preferred creditors, would pay only a small percentage of the other debts, and it is highly probable that *my real estate and stock* would be sold at a sacrifice, and that it would take from 6 to 12 months to collect all the good debts and distribute the money among the creditors.

Under these circumstances I think you and the other creditors will be far more benefited by an extension than by forcing me to an immediate settlement. Please reply at once, as I must decide without delay what course to pursue.

Very truly yours,

CHAS. E. STRAUS.

STATEMENT.

*Liabilities.*

Merchandise accounts, -	-	-	-	-	-	-	\$19,000
Accommodation indorsers, -	-	-	-	-	-	-	10,000
Total liabilities, -	-	-	-	-	-	-	\$29,000

*Assets.*

Stock of goods on hand about -	-	-	-	-	-	-	\$ 5,000
Good debts due L. & S. " -	-	-	-	-	-	-	15,000
Real estate belonging to C. E. Straus, -	-	-	-	-	-	-	3,000
Total, -	-	-	-	-	-	-	\$23,000

It is probable that something may be made out of about \$6,000 of bad and doubtful debts.

One of the witnesses, H. B. Boudar, an expert in book-keeping, makes a statement, drawn from the books of the concern, which shows that on the first February, 1882, the capital had been reduced from \$6,109.93 to \$618.04; but C. E. Straus makes a counter-statement, claiming a capital, at the date mentioned, of \$3,326.59. Statements and counter-statements of plaintiffs' counsel, and of C. E. Straus, respectively, show a deficit on the second October, 1882, between the assets and indebtedness of the firm, to the amount of \$9,000, disclosing a total loss of the capital, and positive insolvency, as admitted in the circular letter.

Upon this condition of facts, the complainants, none of whom had obtained judgments against the firm, exhibited their bill in this court on the second October, 1882, eight days after the dissolution of the firm, charging actual and constructive fraud, praying the appointment of a receiver, and for an injunction, and for the usual relief proper in such a condition of affairs. An order was at once given, directing the marshal of this court forthwith to take possession of the goods in the store-house, 1302 Cary street, Richmond, temporarily restraining the defendants from interfering with the said goods, and from making collections of the debts due the firm, and fixing a future day for hearing the prayer for a preliminary injunction. Since then

full proofs have been taken by the parties to the cause, argument has been had as upon a final hearing, and the cause is by consent before me for a final decree.

The primary and principal question in controversy is as to the competency of this court, as a court of equity, to entertain the bill exhibited in this cause, and to grant the relief for which it prays. That the firm of Iseman & Straus was insolvent on the day of dissolution is too plain for discussion, and is virtually admitted; and the question of the competency of this court to entertain the bill and grant the relief sought depends upon the condition of the property and assets of the firm at the time the bill was filed, to-wit, on the second October last.

The firm was confessedly and hopelessly insolvent. Iseman had retired from it, and had left Straus in custody of the goods, with full power to collect the claims due from customers; and this had been advertised to the world in a public newspaper. Moreover, Iseman had accepted, as a consideration for doing what he did, the notes of Straus, satisfactorily indorsed, for \$4,000. Straus had written to all creditors a letter expressly stating and necessarily implying that the goods and all uncollected claims had become his separate property. If, in consequence of these transactions, there was a transfer from the firm to Straus, then the firm being insolvent, and the rights of creditors imperiled, the transfer on the part of Iseman was voluntary, and on the part of the firm constructively fraudulent; and it became competent for a court of equity to avoid the transfer, under section 2 of chapter 175 of the Code of Virginia, and to take charge of and administer the effects according to the equities of the case. For, if there was a transfer, its effect was to produce a radical change in the character of the property, which ceased longer to be social effects liable primarily for the debts of the firm, and only secondarily for those of its individual members, and became individual effects, liable primarily to the debts of Straus, and secondarily to those of the firm. Colly. Partn. (Perkins' Ed. 1853) § 174.

A transfer having such an effect falls plainly within the contemplation of section 2 of chapter 175 of the Code of Virginia, which declares "that a creditor, before obtaining judgment or decree for his claim, may institute a suit to avoid a gift, conveyance, assignment, transfer of, or charge upon the estate of his debtor, which he might institute after obtaining such a judgment or decree." If there was in this case such a transfer of the partnership property of the insolvent firm as this statute contemplates, then the effect of it was to bring the present case within the ruling of the supreme court of appeals of Virginia in the case of *Wallace v. Treagle*, 27 Grat. 486, 487, in which the court said:

"Previous to section 2 of chapter 175 of the Code, first enacted in the Code of 1849, it was the settled rule of the courts that a creditor at large could not resort to a court of equity to impeach any conveyance made by his debtor, on

the ground of fraud. If real estate was the subject of the conveyance, a judgment was regarded as sufficient. If goods and chattels, or any equitable interest therein, although incapable of being levied on, were embraced in the conveyance, the creditor was required to take out execution, and have it levied on or returned, so as to show that his remedy at law failed. \* \* \* Section 2 was intended to afford a remedy in such cases, and to declare that a party creditor who filed his bill to avoid a fraudulent conveyance acquired a lien upon the property of the debtor conveyed in such void conveyance, if he obtained a decree setting it aside, and in that event the lien attaches from the day the bill is filed."

Proceeding still on the hypothesis that there was a transfer of the social effects in this case to Straus, such as gave the complainants the right to proceed without judgment, the next question arising is whether they had a right, on general principles of equity, to bring this bill.

If A. and B. are partners, and are pecuniarily embarrassed, and convey goods which they hold in common in payment of a debt due by B. individually, the transfer is voluntary, and constructively fraudulent on the part of A. For A. was entitled to require that the whole value of the goods should be appropriated to the discharge of the joint debts, and he cannot forego this right in favor of B., or of his own separate creditors, without a manifest wrong to the creditors of the firm. See *White & T. Lead. Cas.* (Hare & W. Ed.) pt. 1, p. 394. If a person or firm is indebted at the time of a voluntary transfer of property, it is presumed to be fraudulent in respect to debts antecedently due; and no circumstance will permit these debts to be affected by the transfer, or to repel the legal presumption of fraud; and this is so without regard to the amount of the debts or the extent of property. The law disables the debtor from making any voluntary settlement of his estate to stand in the way of existing debts. Some authorities hold that this doctrine is qualified in favor of third persons who come *bona fide* into possession of the property transferred. But this is the only qualification; and it does not apply in this case at bar, where there are no innocent third persons whose rights are involved. See *Case v. Beauregard*, 99 U. S. 119.

From the right of the firm (and of its creditors) to the partnership assets results the duty of its members to see that they are appropriated to the payment of the joint debts. For this purpose each member of the firm has an equitable lien extending to the whole of the common stock, to which member's lien the partnership creditors may be subrogated as against the partners individually and their separate creditors. 2 *Lead. Cas. Eq.* pt. 1, p. 401, and cases there cited. Therefore, if in the present suit there was a transfer of the effects of the firm to Straus, and that transfer be *avoided* or set aside as voluntary and constructively fraudulent, then the jurisdiction of equity to proceed with the cause is founded upon the right of subrogation just stated, which equity gives to creditors of the firm. The lien of partners and of creditors by subrogation upon the whole funds of the part-

nership, for the balance finally due to the partners respectively, seems incapable of being enforced in any other manner than by a court of equity through the instrumentality of a sale. Besides, the creditors of the partnership have the right to have their debts paid out of the partnership funds before the private creditors of either of the partners. But this preference is, at law, generally disregarded; in equity, it is worked out, as before indicated, through the equity of the partners over the fund. 1 Story, Eq. Jur. § 675. Where a dissolution of the firm has taken place, an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business and make sale of the partnership property; so that a final distribution may be made of the partnership effects. 1 Story, Eq. Jur. § 672. The jurisdiction of the court of equity, although it may attach on the ground of actual or constructive fraud, or accident or mistake, is not necessarily dependent upon them; but may be exercised on other distinct grounds in which the subject-matter is *per se* within the equitable jurisdiction. Among these are matters of account; and, as incident thereto, matters of partnership. 1 Story, Eq. Jur. § 441. Cases of account between partners fall under the considerations which give to courts of equity concurrent jurisdiction with courts of law in matters of account. If the transfer of the partnership goods to Straus, in the case at bar, be set aside by this court, then Straus would be held to have been, before this suit was brought, in contemplation of equity, the trustee or agent of the members of the firm for the partnership creditors, to manage the fund in their respective interests. As such, if Straus was bound to keep the property of the firm distinct from his own, and if he mixed, or was about to mix, it up with his own, the whole would be taken to be the property of the firm; and a court of equity, through its original inherent and independent power as such, would have jurisdiction to enforce the right of the retiring partner and the social creditors to a proper administration of the fund. 1 Story, Eq. Jur. §§ 466-468, 504. It is not essential to the vindication of the equity of partnership creditors that the assets shall have passed from the hands of the firm into those of an assignee, and a chancellor may, on proof of insolvency, and that there is good ground for believing that the partnership property has been or will be misappropriated, award an injunction at the instance of a judgment creditor, and appoint a receiver to wind up the business of the firm. *Collins v. Hood*, 4 McLean, 186; *Jones v. Lusk*, 2 Metc. (Ky.) 356; and numerous other cases cited in 2 Lead. Cas. Eq. pt. 1, p. 401. In Virginia, Maryland, and some other states this will be done at the instance of creditors at large. *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Hubbard v. Curtis*, 8 Iowa, 13; *Thompson v. Frist*, 15 Md. 24; *Sanders v. Young*, 31 Miss. 111, cited in *Silk v. Prime*, 2 Lead. Cas. Eq. pt. 1, p. 404; and the Illinois case of *Rappleye v. International Bank*, 93 Ill. 396.

I have gone more largely into this question of the general equity

jurisdiction in matters of account, partnerships, trust, and constructive fraud, because, on these grounds, the court has abundant jurisdiction to entertain the present bill, and grant the relief it prays, without considering the question of actual fraud, so elaborately discussed by counsel on either side. The question of actual fraud has been entirely pretermitted by me in arriving at conclusions in this case. I am free, however, to say that if it had been necessary to pass upon that question, I would not have felt justified in basing a decree on that ground, and do not think that actual fraud had been practiced. Nor would I be understood as implying, from what has been said on the general jurisdiction of equity in matters of trust, account, constructive fraud, and partnership, that a court of equity could not entertain such a bill as this of complainants here, and on general grounds of equity jurisdiction take possession of partnership goods recently transferred and still existing *in specie*, and readily found and identified, independently of section 2 of chapter 175 of the Code of the state. It is unnecessary, in the present suit, to consider that question, the statute giving all needed authority.

It may be proper to inquire whether Iseman had power to make the transfer to Straus which he is claimed to have made by complainants. I think this right was clear. In *Jones v. Lusk*, before cited, it was held that a sale by one of the partners to the others, of his interest in the firm, passes the right of property as between the partners, and against all the world except the partnership creditors, but can be impeached by the creditors by a bill in equity; and such is the teaching of all the authorities. It is a general principle that one partner may sell his interest as well to his copartner as to another purchaser; and if the sale be valid, it will vest the exclusive title in the purchaser. *Ex parte Ruffin*, 6 Ves. Jr. 119, 126; *Ex parte Williams*, 11 Ves. Jr. 3; Story, Partn. § 510. If the consideration of the transfer be that the partner buying shall pay the debts of the firm, this will not, by mere force of the contract, raise a trust in favor of the creditors. Inasmuch as they derive their lien from or through the partners, and as the retiring partner parts by the sale with his lien, and takes the personal security of the other to pay the debts, the lien is lost through which the creditors may work out their equity as against the assets of the firm. 2 Lead. Cas. Eq. pt. 1, p. 399.

In view of these general principles respecting the powers of a partner, it is clear that Iseman could have transferred his rights in the partnership effects to Straus, and that, if the partners so intended to do by their dissolution of September 25, 1882, they were competent to make the transfer. If they made it, then it was competent for this court, as a court of equity, to entertain a bill to set it aside, with a view to a sale, and to a distribution of the proceeds according to the equities of the case. The only question, therefore, remaining to be considered, is whether there was such a transfer as, upon the principles that have been enunciated, should be set aside by this court,



under the authority of section 2 of chapter 175 of the Code of Virginia. It may be conceded that there was no formal, express, or explicit transfer; that there was no writing in the nature of a conveyance or assignment. If the effects of the firm had been realty instead of personalty, it might have been doubted whether, without such a conveyance, there was an effective transfer of title or property. But the effects were personalty, transferable by delivery. They were personalty which had been in the joint possession of the firm, and of which one partner relinquished his joint possession to the sole possession of the other partner. The retiring partner sold his interest in the effects of the concern for a consideration; that consideration being notes, satisfactorily indorsed, for \$4,000, and the undertaking of Straus that he would pay the debts of the firm. Can it be pretended that Iseman, after having received the \$4,000 of consideration money, or its equivalent, and signed the agreement of dissolution, and retired from the joint custody of the goods, and relinquished the joint collection of the claims of the firm, for eight days, could have gone back to the store-house, and resumed his joint proprietorship of the goods and a joint control in the management of the business? I think it is perfectly clear that he could not have done these things; and that he could not have done them is itself a demonstration of the fact of transfer.

It may be conceded that mere dissolution does not of itself operate a transfer of the social effects to a partner who, as successor to the firm, assumes the settlement of the partnership affairs. It may be conceded that an authority given to one partner by the other to close all the business transactions of the firm does not of itself operate as a transfer of partnership effects. But these are propositions applicable only to solvent partnerships. It may be conceded that, in general, no dissolution of any kind affects, in the eye of equity, the rights of third parties, who have had dealings with the partnership, without their consent. None of these propositions conflict with counter-propositions in regard to insolvent partnerships like that of Iseman & Straus.

In order to convert joint into separate property, it is not necessary, in the case of goods *in specie*, that there should be a deed of assignment to the remaining partner. Delivery of the goods, coupled with due notice that the partnership is dissolved, and that the remaining partner will pay the debts of the firm, is sufficient evidence of an agreement to change ownership. Colly. § 895, (Ed. 1853.) This principle was established by the case of *Ex parte Williams*, 11 Ves. Jr. 3, and has been adopted as settled law by all courts and text writers for nearly a century. In that case, Shepherd & Smith dissolved their partnership on the fifth of September, 1803, and advertised the fact in a newspaper on the twenty-fifth of the succeeding November, with a statement that all debts would be paid by Shepherd. Shepherd went into bankruptcy in December, having still on hand, *in*

*specie*, property which had belonged to the firm. The question was whether this property had remained social effects, or had become the separate property of Shepherd by having passed as such to his assignee in bankruptcy; and it was determined by Lord ELDON, that they were separate effects, and had passed to Shepherd's assignee. In that case there was evidence of a formal agreement that the property should pass to Shepherd, as there is evidence here that for the consideration of notes for \$4,000 satisfactorily indorsed, and payment of the debts of the firm, Iseman sold his interest in the goods to Straus. The case of *Ex parte Williams* rules the present case, and I will decree for the complainants.

---

After the foregoing decision of the court had been rendered, counsel for defendants moved to dismiss for want of jurisdiction, on the further ground, not before raised, that no one of the complainants, at the date of the commencement of the suit, held any claim already due and payable amounting to \$500, the amount necessary in all cases to give jurisdiction to a United States circuit court. The bill had set forth that the complainants were some of them citizens of Ohio, and others citizens of New York; that W. W. Johnson & Co., complainants, held a matured acceptance of the defendants for the amount of \$308, and that defendants owed the said complainants the further sum, not yet due, of \$1,235.17; that complainants Cook & Beuheimer held an acceptance of defendants due the third day of October, 1882, for \$280.22, and a further claim not yet due of \$298.41; that Rheinstrom & Bro. held claims against defendants, by acceptance and upon account not yet due, to the amount of \$1,781.41; and that complainants the Mill Creek Distilling Company held claims, by acceptance and open account, against defendants to the amount of \$1,803.84,—all of which are set out by exhibits filed with the bill. The answer of defendants makes no denial of the claims of the complainants for the amounts enumerated. The motion was denied, on grounds stated as follows, by

HUGHES, J. There is no denial by the defendants, in their answer to the bill, that any of the sums claimed by the complainants to be due them, respectively, are just claims. Some of those which were not due at the filing of the bill in the afternoon of the second October, 1882, have since matured, and matured before the filing of the answer.

It is perfectly true, and it is well-settled law, that if no one of the claims of any separate complainant, against the defendant in a cause, amounts to \$500, jurisdiction cannot be created by several complainants combining their respective claims into an aggregate until the whole reaches \$500. If that were the case at bar, the mo-

tion of defendants would be promptly granted, and the cause dismissed. But each one of the complainants here has an acknowledged claim exceeding \$500, and the only objection which can be charged against the jurisdiction of the court is that part of the amounts due by the defendants were not actually payable at the time the bill was filed. Ordinarily in equity, and probably always at law, this objection also would defeat the jurisdiction of a United States circuit court; but here insolvency was charged, and is virtually confessed. The goods seized, which were the principal fund out of which the claims of complainants could be paid, had recently passed into the individual possession and become the individual property of one partner, and he, as the record and proofs show, the least responsible partner of the two. Most of the goods so transferred could yet be found *in specie* and identified, but there was danger every hour that they would disappear and become intangible; and unless the court could act before other debts of defendants matured for payment, complainants would lose all remedy in a United States court. I think the admitted fact of insolvency, the acknowledgment by defendants of the indebtedness charged in the bill, and the imminent peril of the goods, made a case for the interposition of this court, as a court of equity, too strong to be overcome by the technical objection that part of claims acknowledged to be due had not yet matured for payment.

The reason for thus ruling is the stronger in the present case, as the motion under consideration was not made until after answer was filed, full proofs taken, elaborate argument of counsel at final hearing was had, and a decision formally rendered by the court on all the points raised in the case.

---

At a further hearing of this cause on the seventh December, 1882, the question argued was whether the court, in disposing of the funds arising from the sale of the defendants' stock of goods, and the collection of the claims due this late firm from creditors, would first pay the complainants in this bill, or would distribute the fund *pro rata* among the creditors generally. Some half dozen of the creditors, on or about the day after the filing of the bill, obtained confessions of judgment for their claims, and established liens in their favor by taking out executions on these judgments. Counsel for complainants (John A. Coke) insisted that they had a lien upon the funds in the cause from the date of the filing of the bill; citing, in support of his petition, *Wallace v. Treacle*, 27 Grat. 479; *Coates v. Muse*, 1 Brock. 539, 543; *Green v. Neal's Lessee*, 6 Pet. 291; *D'Wolfe v. Rabaud*, 1 Pet. 476; *McCalmont v. Lawrence*, 1 Blatchf. 232; *Leffingwell v. Warren*, 2 Black, 599; and 2 Abb. Nat. Dig. 63, 64. Counsel for defendants (Mr. Meredith, of Meredith & Cocke) insisted that the proper rule was a *pro rata* division of the fund; citing, in support of his contention, Conkl. Pr. 658; *Neves v. Scott*, 13 How. 270; *Pennsylvania v.*

*Wheeling Bridge Co.*, Id. 563; *Noonan v. Lee*, 2 Black, 509; 1 Pom. Eq. Jur. 444, 445; *Washburn v. Bank of Bellows Falls*, 19 Vt. 291; *Flack v. Charron*, 29 Md. 311; and *Collins v. Hood*, 4 McLean, 187.

HUGHES, J. If the court had jurisdiction of this cause by virtue of the original inherent jurisdiction of a court of equity, it would probably be its duty to distribute the fund in its hands *pro rata* among creditors; and this, on the favorite principle of chancery courts that *equality is equity*. It might be its duty, moreover, to require that the bill of any creditor brought to create a charge upon the assets of a partnership should be a creditors' bill filed, on the part of the immediate complainant, for himself and all other creditors who might come into the suit. As I have already said, however, in the original opinion filed in this cause, the bill here is brought under authority of section 2 of chapter 175 of the Code of Virginia. That section allows "a creditor," meaning any creditor, to file a bill on his own account alone, for the purposes indicated by the section, before obtaining judgment. It does not require this creditor to bring a general creditors' bill, and it fixes the rights of the creditor suing, as to the position in which he shall stand among creditors, in the order of distribution. It declares that, if successful in his suit, he shall have "all the relief, in respect to the estate of the defendant, which he would be entitled to after judgment or decree for the claim" for which he sues. The meaning of this language of the section may not originally have been free from ambiguity; indeed, it was not; but it has been construed by the court of highest resort in Virginia to mean that such a bill operates as a lien from the day on which it is filed; and that it establishes for the complainant the right to be paid, out of the fund which is the subject of suit, in preference to all creditors whose liens or claims are of equal dignity with his own.

The language of the supreme court of appeals of Virginia, in *Wallace v. Treake*, 27 Grat. 487, in commenting upon this section, is, (the italics being that court's:)

"It is plain that, by the very terms of this statute, the creditor assailing successfully a fraudulent conveyance, is placed in the same position, and is entitled to the *same relief*, as if he had already obtained a judgment or decree against his debtor. What is that position, and what is that relief? Plainly *a lien* upon the property of the debtor; just as if he had, at the filing of his bill, already obtained a judgment or decree. The statute places the creditor who assails a fraudulent conveyance, if he succeeds in vacating it, in the position of one already having obtained a judgment or decree, and his lien subsists from the time of filing his bill. It is plain that creditors filing a bill to set aside a fraudulent conveyance acquire a specific lien, and one entitled to priority over other creditors at large."

Such being the statute law under which this suit is brought, and such being the clear and emphatic interpretation of that law by the court of last resort in the state, the question with me is whether I should accept that interpretation of the statute or distribute the fund

in this cause on some other rule. This question has often arisen in the courts,—especially in the federal courts. It is well settled—indeed, it is settled by statute (thirty-fourth section of the judiciary act of congress, 1 St. at Large, 92)—that the laws of the several states, not in conflict with those of the United States, shall be the rules of decision in “trials at common law” in the courts of the United States; and therefore the question before me is narrowed to the inquiry whether, in cases not at common law, or, like the one at bar, cases in equity, statutes of the state affecting the rights of parties, and proceedings in court, furnish the rule of decision for federal courts of equity, and whether the interpretation put upon those statutes by appellate state courts must be adhered to and enforced by federal courts of equity.

We have an important precedent on this point in an early decision of this very court, in an equity case. That was the case, tried in 1822, of *Coates' Ex'x v. Muse's Adm'r*, 1 Brock. 537, in which Chief Justice MARSHALL said:

“It is always with much reluctance that I break the way in expounding the statute of a state; for the exposition of the acts of every legislature is, I think, the peculiar and appropriate duty of the tribunals created by that legislature. Although, if a case depending on a statute not yet construed by the appropriate tribunal comes on to be tried, the judge is under the necessity of construing the statute, because it forms a part of the case, yet he will yield to this necessity only where it is real, and when the cause depends upon the statute. The reluctance with which he yields to it is increased when, as in this case, the language of the act is sufficiently ambiguous to admit of different constructions among intelligent gentlemen of the profession. In such a case he will be particularly anxious to avoid giving a first construction, and will avoid it, if the case can be otherwise decided.”

All this implies that where the law of a state determines the rights of parties, and those rights come before a federal court, either in a case at law or in equity, for adjudication, that court is bound to accept such exposition of the meaning of the law as the state courts have given it, and ought not to give an exposition of its own unless there has been no previous exposition of it by state courts. I see many decisions in apparent conflict with this principle, but none that are in real conflict. Where the state law fixes the rights of parties, and equity need not resort to its own principles for the determination of those rights, in such cases it cannot do so, even though its own principles may seem more consonant with natural justice.

In the present case we are not in the dilemma deprecated by Judge MARSHALL. There has been an exposition of the precise meaning of the law on which this bill is founded, given, fortunately, by the state's court of last resort; and as this second section of chapter 175 of the Code is one which determines rights, and not merely prescribes a remedy, I feel bound to rule in conformity with the decision in *Wallace v. Treagle*. It is there decided that when the complainant files such a bill as it authorizes, and succeeds in his suit, he acquires

a lien upon the property of the defendant from the date of the filing of the bill, as against all junior lienors and creditors at large. I will decree accordingly.

### WEBB and others v. ARMISTEAD and others.

(Circuit Court, E. D. Virginia. October, 1885.)

#### 1. ASSIGNMENT FOR BENEFIT OF CREDITORS—CAPITAL OF MERCHANT.

The capital of a merchant is that fund which is put up and subjected to the risks of his business as a basis of credit, and as a security to his mercantile creditors against loss from the accidents and misfortunes of trade.

#### 2. SAME—PREFERRING RELATIONS.

If, in any case, this capital is all borrowed, and yet the merchant holds himself out, and allows mercantile agencies to publish him, as owning it in his own right, then a deed made after his failure in business to prefer relations who lent him this capital over the claims of his mercantile creditors is invalid for such a purpose.

#### 3. SAME—BORROWED CAPITAL—ASSIGNMENT TO PROTECT LENDERS.

A merchant, on going into business, borrows large sums from various near relations, and puts the money so raised into the business as capital. The money so borrowed is soon used up in buying out a retiring partner and personal and business expenses. Notwithstanding this, he rates himself in the mercantile agencies as having a capital of \$20,000. He afterwards fails, and makes an assignment to a trustee who was his confidential clerk, cognizant of the true state of his affairs, preferring his relatives from whom he had borrowed money. *Held*, that the assignment was void as tending to hinder and delay creditors.

#### 4. SAME—ASSIGNMENT VOID.

A deed empowering the trustee to continue the business for such time as he should think best, and in doing so to make such purchases as might be necessary to enable him to continue and carry on the business with a view to winding it up, and conferring on the creditors no power to check or control the trustee and to wind up and terminate the business, *held*, in this particular case, to be void on its face, as tending to hinder and delay creditors.<sup>1</sup>

#### In Equity.

*Jackson Guy, Coke & Pickrell*, and *R. G. Pegram*, for trustee and preferred creditors.

*E. Y. Cannon* and *Joseph Christian*, for general creditors.

HUGHES, J. In January, 1882, W. S. Armistead and W. D. Courtney formed a partnership for conducting a mercantile business in oils, greases, and like articles, in the city of Richmond. W. S. Armistead borrowed of his brother Robert the sum of \$2,500, giving for it his note, which, with the interest accrued, is preferred in the deed which the bill in this suit attacks. He put \$2,000 of the money so obtained into the concern. Courtney put in \$1,000. They went on as the firm of Armistead & Courtney for two years. In January, 1884, Courtney drew out, receiving from Armistead \$1,700 in cash for his interest, and Courtney became the agent and manager of the new business for Armistead. The evidence does not show whether or not the

<sup>1</sup>See note at end of case.

business of the firm had been profitable. It is not shown that any formal inventories were taken, or balance-sheets struck. We know nothing of the condition of the business, except that Courtney drew out of it, taking away the \$1,000 which he had put in two years before, and \$700 besides. The new business proceeded in the name of W. S. Armistead, who borrowed more money. Through indorsements of a brother-in-law, Charles H. Talbott, and of the house of Talbott & Sons, Armistead raised \$10,000 in January, and \$2,000 in February, 1884. The latter debt was afterwards reduced to \$700. These two debts are preferred in the deed which the court is asked to set aside. Out of the money so obtained Armistead paid, as before said, the amount of \$1,700, which Courtney received in retiring as a partner. The business of W. S. Armistead went on from January to July, 1884. His personal expenses in the six months were \$2,427; the expenses of running his business were \$4,006. These two outlays, with the \$1,700 paid to Courtney, nearly consumed the \$10,000 borrowed at the commencement of the year. In June, 1884, Armistead borrowed another sum of \$300 from his brother Robert, and one of \$500 from A. W. Garber, giving his due-bills, which are preferred in his deed of assignment. His sales for the six months on which all these expenses were based were only \$34,288; and it seems to be conceded that he sold, frequently and largely, at a loss. His liabilities in July, 1884, were \$25,000.40. The skillful management of his stock of goods by Courtney, as trustee and as receiver of this court, has produced an aggregate of only \$8,310 as assets; so that, at the end of his career, Armistead was behind in the sum of \$16,689.

It thus appears that Armistead had no capital at any time. It is certain that he put none into his business; if we mean by capital that fund which is put up and subjected to the risks of business as a basis of credit, and as a security to mercantile creditors against loss from the misfortunes of trade. Yet it is proved that the firm of Armistead & Courtney allowed themselves to be registered in the mercantile agencies as having \$10,000 of capital; and that W. S. Armistead, when he undertook the business alone, in January, 1884, allowed himself to be rated by these agencies as operating upon \$20,000 of capital; some witnesses say \$40,000. Armistead stopped business in July, 1884, and made an assignment to W. D. Courtney as trustee, preferring the Talbotts for \$10,846; preferring Robert Armistead for \$2,500, with interest for two years and a half, and also for \$300; and preferring A. W. Garber for \$500; the total preferences being \$14,521, on assets producing only \$8,310.

The deed of assignment was executed on the ninth day of July, 1884, and conferred extraordinary powers and discretion upon Courtney, the trustee. He was empowered to convert the property conveyed into cash as speedily as he could do so with advantage to the trust fund; to sell with or without notice, as he might think best, and in such manner as to him might seem most judicious; to sell as a

whole, or in such portions as he might think proper from time to time, and either by private sale or at public auction, for cash or on credit, and altogether in such manner and upon such terms as he might deem advantageous to the fund. With a view to winding up the business, and selling the assets to the best advantage, he was empowered to continue the business for such time as he should think best; and, in doing so, to make such purchases as might be necessary to enable him *to continue and carry on the business with a view to winding it up*. He was authorized, in collecting debts due the house, to compromise them at his discretion; and to employ agents and counsel, and pay them at his discretion. While the deed does not require creditors to release their debts on receiving dividends, yet it confers upon them no power by any action of their own, either singly or collectively, to check or control the trustee in the exercise of the unlimited discretion conferred upon him, and to wind up and terminate the business in the manner usual with trustees.

There can be no doubt that Courtney, the former partner and confidential agent and manager for Armistead, knew that his principal was operating without capital; that he was holding out to his mercantile creditors from whom he was making purchases that he was operating on a large reserve of ready capital; and that these creditors were dealing with him on the faith of such capital, in ignorance of the fact that he was all the time insolvent, and that large family debts of many thousand dollars were lying in abeyance, to be preferred whenever the business should come to the disastrous end which was inevitable. The proofs show that the trustee was as fully cognizant of the facts which characterized the business of Armistead, and which affected the *bona fides* of his deed, as Armistead was himself.

On such a condition of facts as is shown by the testimony in this case, I do not feel that it is necessary for me to resort to the law reporters for authority to set aside this deed. It seems to me to be patent on the face of the deed that it was made with intent to hinder and delay Armistead's creditors in the collection of their debts; and, as to the mercantile creditors, I do not know how a more gross injustice could be done those who gave credit on the faith of a large input capital than was done by this deed, which revealed the fact, when it was too late, that there was no capital whatever available to protect them in the event of losses in trade and shrinkage of values.

I am clear that the deed should be set aside.

#### NOTE.

For a general discussion of the question of assignments for the benefit of creditors, preferences in, void assignments, and fraudulent assignments, see *Wooldridge v. Irving*, 23 Fed. Rep. 676, and note, 682-691.

An assignment for the benefit of creditors, authorizing the assignee "to carry on and conduct said business in his discretion, for such time as in his judgment it shall be beneficial to do so; or to sell all of said goods and stock in trade and property at such times, in such manner, and for such prices as he may deem proper, and apply the net proceeds," etc.,—is void. *Jones v. Syer*, 52 Md. 211.



An assignment for the benefit of creditors, authorizing the assignee to "sell and dispose of the property, and generally convert the same into money, upon such terms and conditions as in his judgment may appear just and for the interest of all parties interested," was held not to be void upon its face, in *Brahmstadt v. McWhirter*, (Neb.) 2 N. W. Rep. 232.

It was said in *Richardson v. Marqueeze*, 59 Miss. 80, that an assignment for the benefit of creditors is not invalidated by empowering the assignee in his discretion to sell for cash, or on such credit as he shall deem for the advantage of all the creditors.

In *Perry Ins. & Trust Co. v. Foster*, 58 Ala. 502, an assignment, for the benefit of creditors, of a plantation, together with the personal property used in cultivating crops upon it, was made in the spring; and provided that the sale should be delayed until the first of December following; and that meantime the property should remain in possession of the assignors, to be used in cultivating the crops; and that the crops, when gathered, should be delivered to the assignee, and distributed under the assignment. It appearing that such property could not be advantageously rented in the spring, and would be sacrificed by a sale then, or if stripped of the personal property, the provision in the assignment was held valid.

---

### BLAIR and others v. WALKER and others.<sup>1</sup>

(Circuit Court, E. D. Missouri. January 11, 1886.)

#### RAILROAD MORTGAGES—DECREE AND SALE IN FORECLOSURE SUIT—EFFECT UPON RIGHTS OF PARTIES WHO HAVE ESTABLISHED LIENS IN STATE COURTS—RECEIVERS—JURISDICTION.

The sale of railroad property under a decree of this court in a foreclosure suit cannot bar the enforcement of judgments of state courts establishing statutory liens against the property, where the judgment creditors have sought to intervene in the foreclosure proceedings, but have had their petitions dismissed without prejudice, even where such judgments have been recovered during the pendency of the foreclosure suit, and while the property was in a receiver's hands, and without making such receiver a party.

In Equity. Motion for injunction.

The complainants allege in their bill that they purchased all the property and franchises of the St. Louis, Hannibal & Keokuk Railroad Company, December 8, 1885, when the same were sold under a decree of this court in the foreclosure suit of *Blair v. St. Louis, H. & K. R. Co.*, and are still the owners thereof; that during the pendency of said suit, and while said property was in the hands of a receiver appointed by this court, judgment was recovered against said railroad in a suit brought in the circuit court of Pike county, Missouri, by James S. Walker and William Van Ness; that said receiver was not made a party to said suit, and that an intervening petition filed in said foreclosure suit by said judgment creditors, asking that their judgment be declared a lien on said company's property, was dismissed; but that, notwithstanding the action of this court in entering its decree under which said sale was made, and in dismissing said intervenor's petition, an execution has been issued upon said judgment, and the sheriff of said county has levied upon property sold to complainants under said decree, and has advertised the same

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

for sale. Wherefore, the complainants ask that such sale be restrained by an injunction.

For the facts concerning said intervening petition, see 25 Fed. Rep. 2.

*Walter C. Larned and Theodore G. Case*, for complainants.

TREAT, J. The plaintiffs, being non-residents, have a right jurisdictionally to institute this proceeding. It is claimed that such right exists also in consequence of a decree of this court in *Blair v. St. Louis, H. & K. R. R.*, (case No. 2,301,) 25 Fed. Rep. 232, causing the sale of the property of which the plaintiffs were the purchasers.

The defendants in this case were not, under the proceedings had, parties to said suit, and consequently not bound thereby. They sought by intervention to become parties, to which objections were made, and the court dismissed their intervention without prejudice, thereby remitting their rights to the state court, wherein their judgment had been entered. The validity of said judgment is not assailed in this bill filed. On what ground, then, is an injunction sought against said judgment and the process issued thereon? Certainly it is a mistake to suppose that the decree of this court concluded the rights of those not parties thereto. The language of the decree cannot be construed to cover more than what the law permits. Besides, the records of this court show that, instead of passing upon the force and effect of the judgment in question, this court, under objections made, determined expressly that whatever was done in this tribunal should be subject to that outstanding controversy.

If, then, the judgment of the state court is valid, how can these plaintiffs invoke an order to enjoin the same. Under the acts of congress, and ordinary rules in equity, plaintiffs have no standing for this motion. Motion denied.

---

CENTRAL TRUST Co. and another *v.* WABASH, ST. L. & PAC. RY. Co. and others.<sup>1</sup>

(Circuit Court, E. D. Missouri. January 6, 1886.)

PRACTICE—MISLEADING STATEMENTS BY COUNSEL.

Where a party has been fairly misled by the conduct or statements of opposing counsel, this court will, as a rule, see that he does not suffer thereby.

In Equity. In the matter of the motions to remand on the petition of the United States Trust Company.

The United States Trust Company, being desirous of foreclosing its mortgage on the Omaha Division of the Wabash system, appeared by its attorney, Mr. Sheldon, before BREWER, J., and obtained an or-

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

der permitting it to make the receivers appointed in the case of *Central Trust Co. v. Wabash, St. L. & Pac. Ry. Co.*, parties to foreclosure suits to be brought in state courts of Iowa and Missouri. The order was made, with the understanding that the object in bringing the foreclosure suits in state courts instead of federal tribunals was to avoid certain jurisdictional questions, and that after being instituted the suits would be removed to the federal courts by the United States Trust Company, and there proceeded with. The cases were not removed by the United States Trust Company, however, and were finally removed to the United States circuit courts for the Western district of Missouri and the Southern district of Iowa by the Wabash receivers, against the objection of the United States Trust Company, which thereupon moved to remand. The matter having been brought up before BREWER, J., at chambers, in St. Louis, the following opinion was delivered:

*Sheldon & Sheldon*, for United States Trust Co.

*Phillips & Stewart*, for Central Trust Co.

*Wells H. Blodgett and H. S. Priest*, for Receivers.

BREWER, J., (orally.) I wish now to dispose of a matter that is really pending in other districts, but was argued here; and that is, the motions to remand in the cases of the *United States Trust Company v. The Wabash Road, The Receivers, et al.* I believe it is backed up by ancient authority that it is oftentimes better, if not easier, to cut a knot than untie it, and I think I shall do that in this case.

It is unnecessary to go back over the whole history of this transaction. It is enough to say that an order was obtained from this court upon statements and representations that a certain line of policy was intended and a certain course would be pursued, and that afterwards that course was not pursued. I do not mean to say by that that I suppose counsel came before me, or afterwards before my Brother TREAT, with any intention of deceiving or of obtaining an order from the court by misrepresentation. I take it to be true, as they say, that that was not their purpose; but still, the fact is that they obtained an order upon representation that a certain plan was to be pursued which was not pursued. Upon obtaining that order, and by virtue thereof, suits were commenced in the state courts of Iowa and Missouri, and after some time had intervened the receivers filed petitions and bonds for removal to the federal courts.

Now motions to remand are made. The receivers, or their counsel, insist that they were misled by conferences with counsel, and by the statements in open courts, into the belief that the plaintiff would itself remove. The plaintiff, on the other hand, claims that there was no occasion for any such mistake on the part of counsel for receivers; that the term of court at which removal could be had in each case had passed before the petition and bond were filed; and, finally, that if both of these things be not true, the cases are not such as are removable at the instance of the receivers.

I do not propose to decide either one of those three questions, simply saying that it is generally true that where a party has been misled—fairly misled—by the conduct or statements of opposing counsel, the court will see that he does not suffer thereby. I think, in these cases, the federal courts might have acquired unquestioned jurisdiction; that there is nothing in the nature of the cases which would prevent such jurisdiction; and that the only objection which can be raised is as to the manner in which, and the party by whom, the removal was obtained. Now I, of course, concede that if the case is one of which the federal courts could not take cognizance, that nothing is waived, and nothing can be waived, as to the matter of jurisdiction; but if the case is one of which the federal courts might take cognizance and have jurisdiction, and the only defect is in the manner in which the case is put into those courts, a waiver of such defect can be made. As between the mortgagor and the mortgagee,—as between the Wabash road, the successor of the mortgagor, and the United States Trust Company,—there was in each case a separable controversy,—a controversy independent of any question as to the apportionment of the burden of receivers' certificates and outstanding floating liabilities. There was a separable, independent controversy between citizens of different states, and, as such, either the plaintiff or the Wabash road could have removed the entire cause into the federal courts. Now, if the plaintiff had proceeded in accordance with the plan which counsel indicated at the time they obtained this order, the cases would have passed to the federal court at their instance, and the jurisdiction would have been unquestioned. But there has been a mistake. Counsel have been misled, and I think it no more than right to the parties to say that these cases must stand now where they would have stood if the parties had proceeded according to the plan which they stated they intended to pursue; and, as a short cut to that, I shall enter an order in each of those courts—that of the Western district of this state and the Southern district of Iowa—that unless the plaintiff, within 30 days, withdraws his motion to remand, and proceeds with the litigation in those courts, I shall set aside every order that has been made authorizing suit against the receivers or permitting them to be made parties in the litigation. In that way, the cases will stand as I think they unquestionably ought to stand, and as the parties represented when they got the order they intended they should stand, for hearing and determination in the federal courts.

Before dropping the matter, let me add two other suggestions. If there is any one thing that I think the court has a right to insist upon in the dealings between itself and counsel, it is that it shall be able to place implicit reliance on every statement that counsel make, not merely of present fact, but of future purpose and plan. In no other way can a court dispatch business promptly, safely, or with any comfort, and especially is that true in a court like this. Take the various states in which I have to travel, and the multitude of entirely differ-

ent questions and cases that are presented, and the applications that are constantly made to me for orders,—I should never feel safe, or act promptly, or enjoy my work, unless I felt that I could implicitly depend upon every statement that counsel made to me, both of what has transpired, and of his plans and purposes. I have always done it, and I always expect to do it, and while some have criticised our profession as wholly unreliable, I have never found them so. I believe, after 21 years of judicial life, I can recall but a single instance, and that in the commencement of my life on the bench, in which I ever knew a counsel deliberately to impose upon me. Of course, such recollections are very pleasant. I think it important that a court should insist upon perfect frankness and the right of implicit reliance, and should shut the door against even a suspicion that such has not been in any case the fact.

The other point I wish to refer to is this, that while we have insisted in this Wabash case all the way through, and do insist in this particular order, that the cognizance of these matters shall be had in the federal courts, it is not in the slightest degree because of any want of confidence in the state courts. I have been myself too long upon the state bench, and have too profound an admiration for the character and ability of the state judges, ever, in any way, to cast the slightest imputation or reflection upon them. I have no doubt they are fully as competent to do justice, and will do justice, as the federal tribunals; and if the controversy which is raised in this and other branches of the case was a purely independent matter I should be perfectly willing, indeed, I should prefer, that it go to the state courts, so that the federal courts, burdened as they are, might not be troubled with it. But it is not simply a question as to whether the United States Trust Company shall foreclose its mortgage against the mortgagor, the St. Louis, Kansas City & Northern road; but there is involved in the case a question of the apportionment of receivers' certificates and of the burden of floating liabilities upon these various branches. Now, that is a question which, to my mind, and to the mind of my Brother TREAT, it is very important should be kept within one jurisdiction. Supposing these cases were left in the state courts, and they should decree, the receivers being parties there, that no portion of these receivers' certificates was chargeable as a burden on that division, and this court should hold differently: there might be a very unpleasant collision between us; whereas, if they stand in the federal court of Iowa, and the federal court of the Western district of Missouri, both of which tribunals I visit, and where I preside, there will be a singleness of decision. So far as the cases east of the river are concerned, cases which were outside any jurisdiction we possessed, we have sent them all to the federal courts, so that if there should be any difference of opinion between the judges of the federal courts there and here, the cases, in the ordinary course of procedure, can be taken, all of them, to one tribunal, the supreme court of the United

States, and one ruling—one line of decision—settle all the controversies. We have felt in these cases that it was important there should be a unity of control, and that whenever disintegration seemed to be necessary the disintegration should be so guarded, and the jurisdiction permitted to attach should be of that kind, that in case there should be any disagreement between the several trial courts the various cases could all be taken finally to one tribunal, and thereby any unseemly or unpleasant collision avoided; and counsel in this particular case had notice of the fact that the court considered it important. It is not at all, I repeat, with the slightest intent to reflect on the state courts, but to avoid any possible collision. I hope that under the present decree there will be no question of the apportionment of the burden of receivers' certificates, floating liabilities, or anything of the kind, but I believe the French have a maxim that the unexpected always happens, and certainly nothing is certain until it is accomplished; and, until this scheme is perfected, there is no certainty that we may not have to determine how much these various branches respectively must bear of the burden of these receivers' certificates.

*Mr. Sheldon.* Will your honors permit me to say one word in reference to the order you have made. It has been, if you will pardon me for saying so, somewhat of a surprise to us that our position in this matter should have been so misapprehended. The position of the United States Trust Company has been simply enforcing the rights of the beneficiaries under this trust, and it has taken, under the advice of counsel, with the utmost deliberation, the best course to secure that end. It was the first intention of the trust company, as I explained to your honor in my argument, that this suit should be instituted and prosecuted in the federal court; and it was only under the advice of counsel, and by reason of the doubt created, that suits were first instituted in the state courts and afterwards continued there. I am indebted to your honor for your expression of confidence in the good faith of this transaction. It has certainly been in good faith on our part, and, as evidence of that good faith, we are quite willing, in view of your honor's expression of opinion, that these motions to remand may be withdrawn, if your honor is satisfied that the federal court has jurisdiction. That, to a large extent, removes one of the reasons,—the reason why the state jurisdiction was invoked,—and we will consent that these motions to remand may be withdrawn, and that the causes stand here in these two federal courts. If your honor thinks it desirable or necessary to the jurisdiction of the federal courts, we will file the necessary petitions, (which were drafted last June and executed, but never filed, though they were in the possession of the solicitors at the places where the circuit court clerks' offices were situated, for the purpose of filing, when telegraphic direction to the contrary was sent to him from New York;) and I shall also ask your honor, in view of this, and in view of the

confidence which you state you have had in the good faith of counsel, to withdraw that portion of the opinion which speaks of the necessity and value of good faith on the part of counsel. The expression—the mere expression—of it in this connection would seem to be a reflection upon us. Good faith in matters of this sort is something we value so highly that we should prefer the entire proceedings to be disposed of and begun anew rather than that such an opinion should be entertained.

BREWER, J. I certainly thought I had guarded my language so as not to imply that there was any lack of good faith on your part. The only point I wished to set forth was that the order was made on the strength of the statements of counsel as to the plan they intended to pursue, and that afterwards that plan was changed; that was all I meant to say was done by counsel; that the order was made in the first instance in reliance on the statement as to the course to be pursued, and that afterwards, without notice to the court, that course was not pursued. I think that is what I said. I did not impute any intent to deceive or any bad faith on the part of counsel. I certainly do not want to cast any reflection upon counsel, but at the same time I am frank to say I think counsel made a grievous mistake, especially after the clear notice given here in open court that the matter of the future forum was matter, in the judgment of the court, of importance, when they changed their plan that they did not come to the court and say: "We do not want to pursue that plan, and still want the order to stand."

Mr. Sheldon. It did not occur to us that the mere institution of this action was a matter of particular interest to the court, or that the court was interested with us in securing perfect title through foreclosure proceedings; and in adopting the course which it was deemed best, or seemed best entitled to secure that end, we thought the court was at one with us.

The Court. I will see that what I have said is revised before it is filed.

Mr. Sheldon. And these two motions may be considered as withdrawn.

Brewer, J. Have the motions been filed?

Mr. Sheldon. They have not been filed.

UNITED STATES *v.* HEILNER and another.

(Circuit Court, D. Oregon. January 15, 1886.)

## 1. MEASURE OF DAMAGES IN ACTION FOR THE CONVERSION OF TIMBER.

An innocent purchaser; from a willful trespasser, of timber cut on the public land, is liable for the value of the timber at the date of such purchase, including the value of all labor and expense which said trespasser had then bestowed upon it

## 2. CASE IN JUDGMENT.

H. purchased 50,000 feet of lumber at the mill of E., made from timber willfully cut from the public land by the latter, without the knowledge of H., and hauled the same to Baker City, a distance of 20 miles, at a cost of \$5 per thousand, where he disposed of it at \$15 per thousand. *Held*, that in an action by the United States to recover damages for the conversion of said timber, the true measure thereof was the value of the lumber at the mill.

## 3. NEW TRIAL—INTEREST ON VALUE OF PROPERTY CONVERTED.

On the trial it was taken for granted that the lumber was delivered to the defendant at Baker City, and the jury took its value there as the measure of damages; but on a motion for a new trial, it being admitted that the defendant paid for hauling the lumber to that place, and no objection being made to the omission to prove that fact on the trial, a new trial was granted the defendant, unless the plaintiff would remit the cost of hauling, \$250, less \$120, the amount of three years' interest on the value of the lumber at the mill, which the plaintiff had omitted to claim on the trial.

## Action to Recover Damages for Conversion of Timber.

*James F. Watson*, for plaintiff.

*Lewis L. McArthur*, for defendant.

DEADY, J. This action was brought January 2, 1884, to recover damages from the defendants for the wrongful taking and cutting into boards of 400,000 feet of logs, belonging to the plaintiff, and wrongfully converting the same to their own use. It is alleged in the complaint that between June 1, 1881, and the commencement of this action, one O. T. Elliott wrongfully cut and removed from section 17, in township 7 S., of range 38 E. of the Wallamet meridian,—the same being then unsurveyed public land,—400,000 feet of timber, made into saw-logs, of the value of \$800, to a steam saw-mill in Baker county, Oregon, with intent to dispose of the same; that the defendants, well knowing the premises, took possession of said saw-logs, then and there being of the value of \$1,200, and wrongfully cut the same on said mill into boards, of the value of \$4,800, and did then and there convert the same to their own use, to the damage of the plaintiff \$4,800.

On June 2, 1884, the defendants answered separately, denying, substantially, any knowledge of the allegations of the complaint relative to Elliott's cutting and removing timber from the public land; and admitting that on and since October 1, 1882, they each had an interest in the steam saw-mill situate on or near the section aforesaid, but that about said date it was removed to land belonging to the defendants; and denying that they were in any way interested in the



running of said mill between the time of acquiring said interests therein and its removal, or that they ever took possession of said logs, or sawed the same into lumber, or converted the same to their use.

On the trial it appeared that in April, 1882, the defendant Heilner took a conveyance of the mill in question,—it being then located on the unsurveyed public land, and on or near this section 17, and the same day leased it to said Elliott for so much lumber,—the transaction being, in fact, a mere security for the delivery to Heilner of lumber in payment of money theretofore advanced by him to Elliott; that in the summer of 1882 there was received, under said arrangement, by Heilner, at Baker City, from forty to sixty thousand feet of lumber, made from logs cut and taken from said section 17 by said Elliott, which was worth at the mill about \$10 per thousand, and at Baker City, a distance of 20 miles therefrom, \$15 per thousand; and that, although the defendants were then members of a mercantile firm at Baker City, the defendant Ottenheimer had no interest in the transaction. The jury found for the defendant Ottenheimer and against the defendant Heilner, and assessed the plaintiff's damages by reason of the premises at \$750.

Afterwards, counsel for Heilner made a motion for new trial, on the ground that the lumber was delivered by Elliott and received by the defendant at the mill, and the latter paid the cost of hauling the same to Baker City, which was \$5 per thousand. This fact did not appear on the trial, but the case was given to the jury on the supposition that Elliott delivered the lumber at Baker City. On this hypothesis, the jury, taking the mean of the evidence—50,000 feet—as the amount of lumber received by Heilner, and its value at Baker City,—\$15 per thousand,—properly assessed the plaintiff's damages at \$750. But the district attorney now concedes that the defendant did receive the lumber at the mill, and paid for hauling it to Baker City, where, presumably, it was disposed of by him, and finally converted to his own use. But he also contends that, Elliott being a willful trespasser, the defendant is not only liable for the value of the timber at the mill, including the value of the labor put upon it by Elliott, but for the full value of the property at any time after it came into his possession, and before this suit was brought for the conversion, which includes, of course, the cost of transportation from the mill to Baker City.

The rule for ascertaining the damages in such cases has been a vexed question; the volume, if not the weight, of authority being that the value of the property at the time of conversion or appropriation to the use of the defendant, with interest thereon, constitutes the measure of damages. Field, Dam. § 792. But this includes any accession of value between the taking and conversion.

Blackstone (book 2, 404) says that the rule of the Roman law had been copied and adopted by Bracton, and confirmed by the courts of England, that if any property receives "an accession by natural or  
v.26f.no.2—6

artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled, by his right of possession, to the property of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted."

And in *Silsbury v. McCoon*, 3 N. Y. 379, the court went further, and held that when the taking was willfully wrong, it matters not that the species has been changed, the wrong-doer acquires no property in the article produced so long as it can be shown that it was made from the material converted, as when corn is made into whisky.

But the rule laid down in *Wooden-ware Company v. U. S.*, 106 U. S. 432, S. C. 1 Sup. Ct. Rep. 398, is of final authority in this court. In that case it was held that in an action to recover damages for timber cut and carried away from the public land, the defendant, if a willful trespasser, is liable for the full value of the property at the time of commencing the suit, without any deduction for any labor or expense bestowed thereon; but if he is an unintentional or mistaken trespasser, he is only liable for the value of the timber at the time of conversion, less the value of any such labor or expense; and that a purchaser from a willful trespasser, without notice of the wrong or the true ownership of the property, is only liable for the value thereof at the time of such purchase, and not for any labor or expense he may bestow upon it thereafter.

It is admitted that the defendant purchased this lumber from a willful trespasser, and is therefore liable to the United States at least for the full value of the same at the time of such purchase. He bought and received the lumber at the mill, where it was worth \$10 per thousand. If he purchased without notice that the property belonged to the United States, he is not liable for any additional value he may have put on it, before the suit was brought, by hauling it to Baker City; but if he had such notice, he is so liable. As to the knowledge of the defendant, there is no direct evidence, and the circumstances do not warrant any satisfactory inference on the subject.

The objection that this point ought to have been made on the trial was not made by the district attorney, and may be considered waived. Probably he thought the defendant entitled to favorable consideration in this respect for the candid and truthful manner in which he testified when called as a witness by the United States to make out a case against himself, which is a matter of rather rare occurrence in cases of this kind, so far as my observation goes.

Assuming, then, that the defendant was not liable for the value of the lumber at Baker City, but only at the mill, the verdict should not have been for more than \$500.

But, while revising this verdict, there is another circumstance that ought to be considered. The United States was entitled to interest on the value of this lumber from the time of the conversion, in the summer or fall of 1882, until the finding of the verdict, November 27, 1885. No claim for interest was made on the trial, or the court would have instructed the jury to allow the same. But, under the circumstances, I think it nothing more than right to provide that the interest which the plaintiff was entitled to recover be deducted from the \$250, and the verdict considered as excessive only for the remainder. Three years' interest at 8 per centum per annum on \$500 is \$120, which, being deducted from \$250, leaves a remainder of \$130.

The order of the court will be that the verdict be set aside, and the cause retried, unless the plaintiff, within 10 days hereof, enters a *remittitur* for the amount of \$130.

---

TRUE V. MANHATTAN FIRE INS. CO.<sup>1</sup>

(*Circuit Court, D. Colorado. August 6, 1885.*)

FIRE INSURANCE—FORFEITURE—ASSIGNMENT OF POLICY TO SECURE LOAN.

An assignment of a policy merely to secure a loan is not one which is forbidden in the usual prohibition against assignments, since the interest of the insured is not divested; and where such assignment is made with the company's consent, the re-assignment, upon payment of the loan, without consent, does not work a forfeiture, and the insured is entitled to recover.

Ruling on Demurrer.

HALLETT, J., (*orally.*) *True v. Manhattan Fire Ins. Co.* is an action upon a policy of insurance. It is averred that the Manhattan Company issued to the plaintiff a policy upon certain property in Poncha Springs, and thereafter, and before the loss occurred, the same property was reinsured in the Phoenix Company. The defendants answered separately, denying the matters alleged in the complaint, and then setting up a separate defense that after the policy was made, and before the loss, plaintiff assigned and transferred his policy to his brother, whose Christian name is to the defendant unknown, which assignment was sanctioned and assented to by the Manhattan Company, and that the brother remained the owner of the policy until after loss occurred. To that the plaintiff replied that the assignment of the policy was to secure a loan made by his brother to him, which was then secured upon the property insured in and by said policy, and that before the institution of the suit the plaintiff paid off and discharged the loan which he had thereto.

<sup>1</sup> From Insurance Law Journal.

fore obtained, and as collateral to secure the payment for which he had transferred said policy to said H. A. True. Thereupon the said H. A. True reconveyed and made over the said policy, and all rights to recover any sum that might be due and payable therefor. There is a demurrer to this replication.

An assignment of a policy as a security of a loan of money is not one which is forbidden by the usual provision in policies to the effect that if any assignment be made without the written consent of the company, it shall work a forfeiture of the policy. That clause is held to relate only to such assignments as divest the assignor of all interest in the policy and in the property. If he make sale of the property, and thereupon assign the policy to the purchaser, without the consent of the company, it will avoid his policy. But any transfer which does not have the effect of divesting him of all interest in the property, if, notwithstanding the transfer, he still retains an insurable interest in the property, it does not have that effect. The reason is, the company is only entitled to know when the property passes into the hands of another, so that the risk may depend upon the other, instead of the person to whom the policy was issued. To borrow money upon the premises does not have that effect. In some policies there are clauses forbidding the incumbering of the property. Perhaps, in such a case, the incumbrance would avoid the policy; but that is not the question here, because it is not alleged in the answer that the plaintiff incumbered the property, but only that he assigned his policy; so that the question is, upon the answer and upon the replication to the answer, whether the assignment being made as security for a loan, that will operate to discharge the company; and upon that it must be said that it will not have that effect. Upon paying off the loan, the right in the plaintiff to the policy was regained,—became complete again,—and I think this would be true whether there had been any express assignment or reassignment by H. A. True or not. This position is supported by authorities cited in *May, Ins.* § 379.

The demurrers to the replications will be overruled.

---

UNITED STATES *v.* SINNOTT and others.

(*Circuit Court, D. Oregon.* January 11, 1886.)

1. INDIAN SAW-MILL.

Lumber made at the saw-mill on the Grand Ronde Indian reservation is in fact the "property" of the Indians thereon, and not that of the United States, within the purview of section 3618 of the Revised Statutes; and the agent, subject to the instructions of the commissioner of Indian affairs, may dispose of any portion of the same, and apply the proceeds to the support of the mill, or otherwise for the benefit of the Indians, without reference to section 3617

of the Revised Statutes, requiring money received for the use of the United States to be deposited to its credit.

2. DOUBLE PAYMENT OF SALARY.

The superintendent of Indian affairs in Oregon returned to the department two vouchers for the payment by him of the salary of the agent of the Grand Ronde reservation for the second quarter of 1873, each being marked "triplicate," from which the accounting officers assumed that the salary was paid twice, and charged the agent with the amount of such payments in the settlement of his official accounts. *Held*, (1) that on the face of the transaction it was apparent that these two papers were but parts of one voucher taken in triplicate, and that there was but one payment; and (2) that, if there had been two payments, the agent, although liable for the excess, as an individual, as for money had and received to the use of the United States, was not liable therefor on his bond.

8. MONEY PAID BY AGENT WITHOUT AUTHORITY.

The defendant Sinnott employed a person on the reservation aforesaid, as "superintendent of farms and mills," and, in reporting the fact to the commissioner, said that he did so at the instance of "some political friends," but there was really no necessity for the employment, and advised that it be disapproved, which was done; but the agent continued the person in such employment, and paid him therefor, and, on settlement of his accounts at the treasury, \$1,500 thereof was disallowed. *Held*, that the payments being not only without authority, but contrary thereto, were illegal, and the agent and his sureties are liable therefor.

At Law.

*James F. Watson*, for plaintiff.

*William B. Gilbert*, for defendants.

DEADY, J. This action is brought on the bond dated March 5, 1872, of the defendant Patrick B. Sinnott, as Indian agent at the Grand Ronde reservation, and of the defendants Luzerne Besser and E. Cahalin, as sureties therein, to recover a balance of \$3,048.18, alleged and ascertained to be due the plaintiff thereon, at the United States treasury, March 21, 1885, on account of money and property received by said Sinnott under said bond and not duly accounted for, with interest from said date at the rate of 6 per centum per annum, and costs and disbursements. The answer of the defendants consists of a denial of the failure of Sinnott to account, and the correctness and justice of the settlement at the treasury. The case was heard by the court without the intervention of a jury. The sum sought to be recovered consists of these items, namely: (1) \$1,179, the proceeds of the sale of certain lumber made at the Indian saw-mill; (2) \$375, the amount of a second payment by the superintendent to the agent on his salary account, for the second quarter of the year 1873; (3) \$1,500 paid to C. D. Folger, between July 1, 1874, and August 25, 1876, as "superintendent of farms and mills," less a credit of \$5.82 for an unexpended balance deposited to the credit of the United States. The mill at which this lumber was sawed was erected by the United States for the Indians of this reservation in pursuance of the treaty with the Umpquas, of November 29, 1854, (10 St. 1125,) and that with the Molallas, of December 21, 1885, (12 St. 981,) and in fact belongs to them; and therefore, in my judgment, such lumber was not the "property" of the United States, within the purview of sec-

tion 3618 of the Revised Statutes, which requires the proceeds of any sale thereof to be conveyed into the treasury; nor was the money received therefor, received "for the use of the United States," within the purview of section 3617 of the Revised Statutes.

As the agent and guardian of the Indians, it was the duty of the defendant Sinnott, subject to the instructions of the commissioner of Indian affairs, to dispose of the lumber made at this mill, and not needed by the Indians for their own use, and to use or apply any money or other property received therefor for their benefit. This lumber was the product of Indian labor, combined with the labor and skill of white men, that the United States bound itself to furnish them in consideration of the cession of their lands. It was not, then, properly speaking, the property of the United States; and certainly not within the contemplation of the sections of the Revised Statutes, 3617, 3618. In this case it appears from the treasury statement and the defendant's accounts that in 1873 he received \$1,079.81 from the sale of lumber, of which he deposited to the credit of the United States, or in some way conveyed into its treasury, \$100.81, and used the remainder in payment of current expenses of the agency, including the wages of the sawyer and loggers, first charging himself with the amount received. At the time he had no instructions to make any other or special disposition of these funds, and did not receive any until October, 1876, when he was instructed to deposit the same to the credit of the United States.

In the second quarter of 1874 the defendant furnished \$200 worth of this Indian lumber for the building of the manual labor school on the reservation, and paid for it out of the funds furnished and designated for that purpose. The money received for this lumber he then applied to the payment of current expenses, first charging himself with the amount, as in the case of the funds so received in 1873.

It is objected that this transaction was contrary to section 3679 of the Revised Statutes prohibiting expenditures in any department of the government in excess of appropriations. But, certainly, this section has no application in the premises. There is no question but that the money expended for the lumber for the labor school was appropriated for that purpose, and the agent had as much right to use it in the purchase of material from the Indians as any one. So that the item of \$200 is in the same category as the one of \$979, and the question concerning both is, was the money disbursed or accounted for according to law? As I have said, in the absence of any instruction to the contrary, in my judgment it was; and the defendant Sinnott should be credited with the amount.

And, even if the disposition of the money received from the sale of the lumber was a technical violation of section 3617 or 3618 of the Revised Statutes, there is no pretense but that the defendant acted in good faith, and the Indians to whom the money really belonged had the benefit of it. And therefore, upon any equitable view of the

transaction, he is entitled to be credited with the amount. *U. S. v. Roberts*, 10 Fed. Rep. 540; *U. S. v. Stowe*, 19 Fed. Rep. 807.

The item of \$375, for double payment of salary, is manifestly a mistake of the superintendent's. It is admitted that the superintendent, Odeneal, who was subpoenaed as a witness, but is unable to attend, would testify, if sworn, that he did not pay the salary twice. Sinnott swears positively that he never received the money but once, and there is nothing in the treasury statement to the contrary. It appears from that that the superintendent paid the agent his salary for the second quarter of 1873, and took a voucher therefor in triplicate, and for some reason, or by mistake, sent two parts of such triplicate voucher, instead of one, with his accounts to the department. Upon this, the accounting officers have assumed, without, as it appears to me, any sufficient reason, that these two parts of one voucher relate to two different and distinct payments of the same amount for the same quarter's salary. Upon a parity of reasoning, if the superintendent had, for any cause, sent the three parts of this voucher to the department, the defendant would have been charged with receiving this salary thrice. It is but fair to add that there is a slight difference in the language of these two papers, in the statement of the account,—the one being for "salary" as Indian agent, etc.; the other for "services rendered the Indian department," as Indian agent, etc. But there is no difference in the language of the receipt by Sinnott or the certificate of payment by the superintendent, and manifestly they are parts of one transaction, and relate to but one payment.

It would be absurd, as well as unjust, to charge Sinnott with the wrongful receipt of \$375 on any such state of facts as this. And if the accounting officers have erroneously credited the superintendent's account with this amount as having been actually paid out by him, the agent is not responsible for the mistake. And furthermore, if this salary had been paid to the agent twice, he would not be liable therefor on his bond. The security for the proper disbursement of this money is the bond of the superintendent,—the officer who received it for that purpose. The agent's bond covers all moneys that come "into his hands," as agent for the Indians, but not that which was paid to him, rightfully or wrongfully, as a compensation for his services. He would be liable, of course, as an individual for money had and received by him, by mistake or otherwise, that belongs to the United States, but not on his bond as agent; nor would his securities be liable therefor at all.

On July 2, 1874, Sinnott wrote to the commissioner of Indian affairs a statement of the employes engaged on the reservation. Among these was C. D. Folger, "superintendent of farms and mills," at a salary of \$1,000 per annum,—a place which seems to have been created for his benefit. On the seventh of the same month he wrote to the commissioner that he "was induced" to employ Folger "by

some political friends" of his, but that, in his "judgment, a superintendent of mills is unnecessary," and that he "had better disapprove of the engagement of the superintendent of mills." And as to a superintendent of farms, he left that with the commissioner, saying, in a sentence that appears to lack something: "I attended to the business of farmer since I came here myself, and now that the farm is to be discontinued after harvest." On July 25th the commissioner wrote in reply, disapproving of "the appointment of C. D. Folger" as unnecessary, the miller being sufficient to run the mill and the agent to manage the farm. But on September 5th he wrote again to the commissioner, urging the approval of Folger's employment, to which the commissioner replied on September 30th, refusing to approve the same. And on March 9, 1875, the commissioner wrote again to the agent, calling his attention to the fact that Folger's name appeared in his report of employes for the third and fourth quarters of 1874 "as superintendent of farms and mills;" and, after referring to the correspondence between them on the subject, closed by saying: "You are now informed that vouchers for services performed by Mr. Folger will not be considered by this office." There is no pretense that Folger performed any service about the mill or farm, but it is claimed that he was of some use, or might have been, in showing the Indians the corners or boundaries of the allotments of lands which had lately been surveyed and assigned to them in severalty. He also acted as clerk for the agent, and in that capacity received and opened his official correspondence.

But the agent was not authorized to employ him in any capacity without the approval of the commissioner, and certainly there was no excuse for his doing so after the employment was expressly disapproved by the latter. His excuse is that he never received the letter of March 9th, and he surmises and suggests that Folger may have suppressed it for fear of losing his place; and, at his request, a day was given him to produce Folger as a witness on this point. But the party, though living in the city, was not produced or examined. But the letter of September 30th was sufficient without anything further to make the employment plainly illegal.

It is true that some of the payments, apparently amounting in all to \$655, were on what was thought equitable ground, allowed by the Indian bureau, after being rejected by the treasury auditor. For instance, the \$250 paid for the third quarter of 1874, which was allowed on the supposition that it might have been paid before the letter of September 30th reached the agent. But this act of grace, as to part of the disbursement, does not render any of it legal, and is no defense to a claim to recover the balance. The money was not only disbursed without authority, but directly in the face of it; and, what is more, with the admitted knowledge that the employment was merely to serve the interest of or oblige "some political friends," and not the public good.



The plaintiff is entitled to a judgment against the defendants for this sum, less the credit of \$5.82, with interest, in all \$1,565.14, with costs and disbursements.

---

UNITED STATES v. SINNOTT and others.

(Circuit Court, D. Oregon. January 11, 1886.)

*U. S. v. Sinnott, ante, 84, followed.*

At Law.

*James F. Watson*, for plaintiff.

*William B. Gilbert*, for defendants.

DEADY, J. This action is brought on the bond dated September 28, 1876, of the defendant Patrick B. Sinnott, as Indian agent at the Grand Ronde reservation, and of the defendants Nicholas B. Sinnott, Daniel Handley, and William W. Page, as sureties therein, to recover a balance of \$500, alleged and ascertained to be due the plaintiff thereon, at the United States treasury, on April 24, 1882, on account of money received by said Patrick B. Sinnott under said bond and not duly accounted for, with interest from said date at the rate of 6 per centum per annum, and costs and disbursements. The answer of the defendants consists of a denial of the allegations of the complaint showing a breach of the condition of the bond.

The case was heard by the court without the intervention of a jury, in conjunction with the foregoing one. The sum sought to be recovered consists of two payments to C. D. Folger, as superintendent of farms and mills for the first and second quarters of the year 1876.

The money was paid contrary to the instruction of the commissioner of Indian affairs, and was therefore illegally disbursed. See opinion in the foregoing case of *U. S. v. Sinnott, ante, 84*.

There must be judgment for the plaintiff for the sum demanded, with interest from the date of settlement, amounting in all to \$581.25, with costs and disbursements.

## CLEAR v. FOX.

(Circuit Court, E. D. Virginia. April, 1885.)

## NEW TRIAL—EXCESSIVE DAMAGES.

A court will set aside a verdict as contrary to the law and evidence as often as considerations of justice may seem to demand. Where one jury found a verdict for \$15,000, which was set aside, and another jury found a subsequent verdict in the same case for \$9,500, this latter verdict was set aside.

*In Assumpsit.*

Two verdicts in favor of the plaintiff were set aside in this case. The nature of the claim and the principal facts of the case are set out in the following opinion.

*Marge & Fitzhugh*, for plaintiff.

*S. Ferguson Beach*, for defendant.

HUGHES, J. When the evidence was concluded at the original trial of this case, I thought it was one in which the jury, from sympathy for a worthy man, rather than on strict grounds of legal right, might allow the plaintiff two or three thousand dollars. When they gave a verdict for \$15,000, I had no doubt that it was my duty to set it aside. On the second trial, the jury has given a verdict for \$9,500; and I am now to pass upon the motion to set that verdict aside. These successive verdicts of exceptionally intelligent juries have given the case an importance which imposes upon me the duty of reducing to writing my views on the law questions involved.

In doing so it will be necessary for me to state in outline my own understanding of the leading facts of the case, which I shall do with no pretension to absolute accuracy of statement, and only to such extent as shall serve the purpose of developing the legal questions on which the case depends.

The defendant, Fox, was owner of a large and well-known gold property in Spottsylvania county, Virginia, which had, under previous owners, been profitably worked. Clear, the plaintiff, who had mined in California, applied to him for a lease, giving a surface-mining privilege. Obtaining this, Clear went upon the property and operated upon it for about seven years. Out of their mutual correspondence and transactions during this period grew this suit, in which Clear claims upwards of \$30,000 as a percentage due him on an alleged sale of the property, and claims also a *quantum meruit* for services rendered.

The plaintiff, Clear, went upon the Whitehall property of defendant upon a contract that he was to have half the gold he could obtain from surface mining, and was to have the use of the farm and the dwelling-house for a nominal rent. The leases were from year to year. He was, from the beginning, repeatedly informed by Fox, the defendant, that he was not to expect the latter to lay out any money on the place. From the outset both Fox and Clear looked to a sale

of the property; and there grew out of this expectation a contract that Clear was to do what he could towards effecting a sale, and that he was to have 5 per cent. of the purchase price, if a sale should be made. Afterwards, in the course of correspondence, Fox voluntarily informed Clear, in several letters, that if the property should be sold for more than \$100,000 by his procurement, he should have a bonus out of the excess in addition to the 5 per cent. These understandings as to what should be done in the event of a sale all went upon the express proviso that the sale contemplated was to be out and out, for money. It was upon such a sale for money, if made, that Clear was to receive 5 per cent. of the purchase price, and a bonus in addition on the excess, if the amount received should exceed \$100,000. As a result of this projected sale, and of numerous negotiations that were from time to time on foot for that purpose, Clear began to do this and that thing on the land with a view of opening and displaying to purchasers its veins, resources, and merits. He dug ditches and trenches, and made drains here and there, from time to time, for this purpose, and money was furnished him by Fox to pay for such work, when requested to do so by Clear. Up to the termination of their mutual operations, in the winter of 1883, Clear had obtained from Fox three or four thousand dollars, and had made, besides, from the property by surface mining, some \$5,000 in gold, by the spring of 1880 or 1881. How much gold Clear obtained between that time and the winter of 1883 does not appear. Probably Clear's receipts of cash from Fox and in gold from the mine aggregated as much as \$10,000 during the seven or eight years in which he had possession of the property. What Clear's expenditures were, during this period, in making openings and developments, and otherwise, does not definitely, or even approximately, appear.

There is no proof that Clear is an educated, scientific, mining engineer. From all that is shown by the evidence, I consider that he is rather an operative than a scientific miner,—a practical miner, whose knowledge of the business has been derived from personal experience and several years of manual labor in surface mining, and such reading, if any, as his occupation may have induced. But whether he was a scientific or a practical miner, a high-priced or a low-priced man, there was nothing in his express contracts, or his correspondence with Fox, to create a claim, or even an expectation, for compensation on general grounds of *quantum meruit*. The existence of express contracts of lease, and the industrious iteration by Fox, in his letters to Clear, that he would make no cash outlays on the property, nor authorize engagements that would entail them upon him, precluded Clear from bestowing services or making outlays that would entitle him to general *indebitatus assumpsit* claims. I do not consider that he had, in law, any right to a verdict for any amount on the general score of *quantum meruit*. But even if he had, they could not be very considerable. Most of his class of men would regard

three or four hundred dollars a year, with dwelling-house free, and unlimited privileges of garden and farm, as affording a fair living, especially when there was coupled with them the chance of making a handsome percentage on the sale of a property valued at a minimum of \$100,000. On the score of general services rendered, I do not think Clear had, in law, any right to compensation for them; and, even if he had a right to some compensation, I do not think it should sound in very many thousands of dollars.

Passing to the claim for compensation for services in the sale of the property,—which is, technically speaking, the foundation of this suit,—it seems that both parties worked faithfully to bring about a sale out and out, for money, for seven years or more; and that their efforts and hopes were all disappointed. At last the thought which had been always repelled before by Fox began to be entertained by him of incorporating the Whitehall property instead of selling it, and putting it in the form of shares in a joint-stock company. In the negotiations which terminated in an incorporation in lieu of a sale of the property Clear and Fox were both active and harmonious participants. They seem both, by force of necessity and under the influence of a common despair of effecting a sale for money, to have abandoned the effort to do so; and it seems to me perfectly clear that, with the failure and abandonment of that project, the contract and understandings which had been had between Clear and Fox, relating expressly and exclusively to a sale of that character, were, in fact as well as in law, abandoned by both of them. There arose such an understanding as to the compensation Clear should get from converting the property into a corporation as can be inferred from sundry expressions which were used by Fox in his later letters to Clear, declaring that he would see that he was provided for in the corporation that was formed as one of nine managing corporators. The very fact that these expressions were used by Fox, and that they were received without protest by Clear, shows that the old provision for Clear of a percentage in money on a sale for money was no longer contemplated, because Clear could hardly claim commissions from buyers and seller both.

The first scheme for a joint-stock company, in which Clear was in terms, and in a manner satisfactory to himself, provided for as a corporator, fell through, with the full consent, and in some degree by the active agency, of Clear. In the second scheme, the company received its deed from Fox and his signature to the contract of organization, on the express condition that Clear was to be one of the original nine corporators. To that scheme of organization Clear gave his full and unconditional consent. If the company which has been organized under that scheme has since excluded Clear from the privileges and rights stipulated in his behalf by Fox, no evidence being adduced to show that this was by the contrivance or even the consent of Fox, the wrong to Clear is that of the corporation and not of Fox;

and I cannot see that Clear has any right of action against Fox. Summing up what I have said, Clear had a valid claim to commissions on a sale for money, in the contingency of such a sale being made. His original contract related exclusively to such a sale, and his rights under it were wholly contingent upon a sale. When the project for such a sale was abandoned, his contract relating to it expired, and his rights under it became *nil*.

The scheme of incorporation was substituted for a sale out and out for money; and whatever rights Clear had under the new scheme could grow only out of such new contract as Fox may have made with him relating to the new scheme itself. The contract, which related exclusively and expressly to the lapsed and abandoned scheme, cannot be applied to the new scheme, of which neither party had any thought when they entered into the original contract. The error of the jury consisted in applying the contract about the abandoned scheme to the new and different scheme. This was neither legal nor just. It was both illegal and unjust.

Such are my views of this case. I have endeavored to avoid a strict detail of facts, and have confined myself to such an indication and outline of them as would illustrate the points of law on which I base my action. On the motion now before the court, I do not think that Clear has any legal claim against Fox for commissions on the sale of the Whitehall property. I do not think, in view of the terms of his lease of the farm and of surface mining privilege, that he has any general *indebitatus assumpsit* claim against Fox for services rendered on the property. Legally his claims are nothing; though equitably I would like to know that he could be accorded a few thousand dollars.

These views may be very mistaken, but they are fixed and I cannot get rid of them. How, then, can I allow a verdict for the large sum of \$9,500 to stand? As a short and easy way of getting rid of personal trouble, and avoiding the discharge of an unpleasant duty, I might let it stand, throwing the responsibility on the jury. But I should always feel that I had allowed injustice to be done, and the legal rights of a stranger to be violated.

On the broad grounds that the verdict is contrary to the law of the case, and does not do justice between man and man, it must be set aside.

## HAZARD v. NATIONAL EXCHANGE BANK OF NEWPORT.

(Circuit Court, D. Rhode Island. January 15, 1886.)

## CORPORATION—TRANSFER OF STOCK—ATTACHMENT—RIGHT OF TRANSFEREE.

On December 30, 1875, A. sold certain shares of bank stock to B., and assigned them by a transfer written on the back of the certificate. By the by-laws of the bank, stock was transferable only on the books of the company. On December 14, 1878, the shares were attached by a judgment creditor of A., and sold and transferred to C. Neither the bank nor the creditor had knowledge of the transfer to B. In January, 1880, B. presented his certificate and transfer to the officers of the bank, and demanded a transfer of the stock, which was refused, whereupon he brought suit against the bank for such refusal. *Held*, that the bank was liable in damages for the refusal to transfer the shares.

At Law.

*Amasa M. Eaton*, for plaintiff.

*William P. Sheffield*, for defendant.

CARPENTER, J. This is an action at law to recover damages for the refusal of the defendant to transfer to the plaintiff 75 shares of their capital stock, and to issue to him a certificate thereof. The case has been heard by the court without a jury. The material facts are that on the thirtieth day of December, 1875, the shares stood in the name of Rowland R. Hazard, Jr., and on that day he sold them to the plaintiff, and assigned them by a transfer written on the back of the certificate; that on the twenty-sixth day of June, 1877, the shares were attached in a suit brought in the supreme court of Rhode Island by Philip Caswell, Jr., and on the fourteenth day of December, 1878, they were sold by the sheriff on execution issued in that suit, and were by the defendant corporation transferred on the books to the purchaser; and that in January, 1880, the plaintiff presented his certificate and transfer to the officers of the bank, and demanded that they be transferred to him, and a certificate issued therefor, with which demand the officers refused to comply. Neither the bank nor the attaching creditors received notice of the transfer to the plaintiff, or had knowledge of the same, before the demand was made by him as above stated. It appears that the by-laws of the bank provide that shares of stock shall be transferred only on the books of the corporation.

The question, therefore, is whether an attachment of stock will take precedence of an unrecorded transfer of which the attaching creditor had no notice. The question has been much debated, and has been differently decided in different jurisdictions. I think it is settled for this court, in a case involving the title to shares of stock in a national bank, by the authority of the decision in *Bank v. Lanier*, 11 Wall. 369. See, also, *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 369. I decide, therefore, that the defendant corporation is liable in damages for the refusal to transfer the shares. In accordance with the agreement of counsel, the question of damages will stand for further hearing, if not settled by agreement.

## UNITED STATES v. MILLER.

(District Court, S. D. New York. January 9, 1886.)

## 1. SUPERVISING INSPECTORS—AUTHORITY TO MAKE RULES—LIGHTS—REV. ST. § 4405—AMENDMENT OF FEBRUARY, 1885, VOID.

The supervising inspectors of steam-vessels have no authority, under section 4405 of the Revised Statutes, to establish regulations to be observed by vessels, except such as relate to carrying out some of the provisions of title 52. The subject of *lights* to be carried by barges, or other vessels, is not included in any of the provisions of title 52, but is regulated by title 48. *Held*, therefore, that the amendment made February, 1885, to section 20 of general rule 3 of the supervising inspectors, requiring barges in tow to carry a red and a green light, is unauthorized and void.

## 2. SAME—BARGES—RULE 8, SECTION 4233—PENALTIES—REV. ST. § 4500—CASE STATED.

The master of the coal-barge R. I. was sued for a penalty of \$500, under section 4500, for not carrying colored lights, as prescribed by the amendment to the supervising inspectors' rules passed February, 1885. *Held*, that barges that have neither sails nor masts are not "sail-vessels" within rule 8, § 4233, nor required under any statutory authority to carry colored lights; and for not doing so are not liable to the penalties prescribed by section 4500.

Action to recover fine.

John Proctor Clarke, for the United States.

Platt & Bowers, for defendant.

BROWN, J. This action is brought under section 4500 of the Revised Statutes to recover a fine of \$500 from the master of the coal-barge Rhode Island for not carrying red and green lights on the night of May 4, 1885, while in tow of the steam-tug Narragansett, as prescribed by the amendment made in February, 1885, to section 20 of general rule 3 prescribed by the supervising inspectors. That amendment is as follows:

"All barges in tow of steamers, (except upon the Red River of the North, and rivers whose waters flow into the Gulf of Mexico,) between sunset and sunrise, shall have their signal lights, as required by law, placed in a suitable manner on the bows of the outside forward boats,—namely, a green light on the starboard bow of the starboard barge, and a red light upon the port bow of the port barge,—when two or more barges are being towed side by side. Said lights shall not be less than ten feet above the surface of the water. When being towed singly, said barge shall have the red and green lights as required by law; said lights not to be less than ten feet above the water."

By the agreed statement of facts, it appears that the barge Rhode Island is not a canal-boat, but a barge proper, enrolled as such, and licensed to carry freight and not passengers. She belongs to the Eastern Transportation Line,—a line for many years engaged in the transportation business, and towing, by means of tugs belonging to the company, their own barges and the barges of others. They run from New York to various ports upon the Sound and upon the coast,—such as New Haven, New London, Providence, New Bedford, Boston, and Newport News. The barges in question are single-decked boats; when loaded the deck is about six feet above the water-line. They are usually towed upon hawsers, one behind the other, from

three to four in a line. That is the only safe way of towing at sea, or upon the Sound, in the rough weather to which they are exposed. The sea in such weather washes over the decks without doing the boats any injury, there being a pilot-house aft of amid-ships above the deck, from which the barges are steered.

For 15 years it has been the established custom to tow barges in this manner. The tug carries the two colored side-lights, and the two vertical white lights, as prescribed by rule 4 of section 4233 of the Revised Statutes. None of the rules of the Revised Statutes prescribe any lights for such barges in tow. Rule 8 of section 4233 provides that "*sail-vessels* under way, or being towed, shall carry the same lights as steam-vessels under way, with the exception of the white mast-head lights, which they shall never carry." These barges are not sail-vessels; they have no masts nor sails, nor any propelling power of their own. Their decks also are closed tight; so that they do not come within rule 12 or rule 13, nor within any other provision of the statute as regards lights. For the past 15 years, however, it has been the established custom for such barges to carry two vertical white lights, about two feet apart, attached to the flag-staff a little aft of amid-ships; the lower light being about 14 feet above the deck and about 20 feet above the water-line. This custom was adopted by the owners of this line, and by others engaged in similar business, from a rule formerly applicable to a steamer at sea when in tow of another, as a signal indicating a tow to all other approaching vessels, and as a signal not likely to be confounded with any other signal. The tow in this case set their lights in accordance with this long-established custom. There were four barges in a single line, one behind the other, attached by hawsers; the first barge was about 720 feet behind the tug, and the three other barges about 600 feet apart. Each barge carried two white vertical lights on the flag-staff, visible for about 5 miles around the horizon, and no other lights. This practice having being long followed, being widely known and understood, and successful in avoiding accidents, through its clear and unmistakable indication of a tow from each barge, the owners, believing that the new rule above quoted, adopted by the supervising inspector in January, 1885, was mischievous, and likely to lead to disasters, and as not within the powers committed to the inspectors by law, have refused to observe it; and this suit has been instituted to test its validity.

1. The only section of the Revised Statutes claimed to confer the power upon the supervising inspectors to pass this rule, or regulation, is section 4405. That section provides that they "shall establish all necessary regulations required to carry out, in the most effective manner, the *provisions of this title*, and such regulations, when approved by the secretary of the treasury, shall have the force of law." This section is a part of title 52, which concerns the "regulation of steam-vessels," and consists of two chapters; the first relating to



"inspection," embracing sections 4399-4462, inclusive, and the second, relating to "transportation of passengers and merchandise," which embraces sections 4463-4500, inclusive. It is not to be supposed that sections 4404 and 4405, in providing that the board of supervising inspectors "shall establish all necessary regulations required to *carry out* in the most effective manner the *provisions* of this title," intended to confer upon that board any general power of legislation upon the subjects of the title beyond the "provisions" and objects specified in a general way in some of the sections of that title; much less was it the purpose of the law to authorize them to make regulations upon subjects not included within that title at all.

The general provisions of title 52 are very numerous and cover a multitude of subjects. The duties of the board in carrying out these general provisions are very varied. The manifest object of section 4405 is, as its very language imports, to secure, "in the most effective manner," a compliance with the various general provisions of title 52; and for that purpose it authorizes the board to establish all necessary regulations to carry out those specific provisions. It clearly confers no power upon the board to establish regulations upon any other subjects than those named in this title; much less, to enact virtual legislation upon other subjects not named. Regulations established in pursuance of the authority committed to the board, when approved by the secretary, have the force of statute. Section 4412 expressly authorizes the board to establish "regulations to be observed by all steam-vessels in passing each other." The board has accordingly established such regulations by prescribing the direction in which vessels meeting shall go, and the signals to be given by whistles. These regulations, when not inconsistent with the specific statutory rules, are held valid and enforced. *The Grand Republic*, 16 Fed. Rep. 424, 427; *The B. B. Saunders*, 19 Fed. Rep. 118, 121. So far as they may be in conflict with the statutory provisions, they are null and void. *The Atlas*, 4 Ben. 28, 30; *The Milwaukee*, 1 Brown, Adm. 313, 321; *The American Eagle*, 1 Low, 425, 427. In the case of *The Eleanora*, 17 Blatchf. 88, 102, Chief Justice WAITE observes that "the supervising inspectors have no power to prescribe rules which would have the force of law, for the government of *sailing vessels*." This, in effect, covers the present case; because it excludes all general power beyond that specifically given to the board in respect to "steam-vessels" under section 4412.

The only "provision of this title" that refers to barges *eo nomine* is section 4492. That section provides that "every barge carrying passengers while in tow of any steamer shall be subject to the provisions of this title relating to fire-buckets, axes, life-preservers, and yawls, to such extent as shall be prescribed by the board of supervising inspectors." This barge, however, was not employed in carrying passengers; and the subjects mentioned in this section, and to which the section is limited, do not include *lights*. Section 4412 au-

thorizes the board to establish such "regulations to be observed by all *steam-vessels in passing each other*, as they shall from time to time deem necessary for safety." But barges are not steam-vessels; neither is the new regulation requiring colored lights to be carried on barges "a regulation to be observed by steam-vessels in passing each other;" so that section 4412 has no application to the present case, and it is not contended that it has. There is no provision in any of the other sections of title 52 that in any way refers to the subject of the lights required to be carried by vessels or barges under way, or that by any stretch of construction could be deemed to include the subject of lights. On the other hand, the lights required to be carried by vessels are a distinct and separate subject of legislation, in a distinct title, namely, title 48, c. 5, § 4233. Nothing in that title gives any power to the supervising inspectors to add to those requirements. It is impossible, as it seems to me, to extend the language of section 4405 so as to make the provisions of title 52 apply beyond the specific provisions of that title, and the subjects mentioned in it; or so as to authorize what is, in effect, additional legislation upon the subject of lights,—an independent subject, treated by congress independently, and in a different title. The amendment of February, 1885, I must therefore, hold to be beyond the powers of the board, and void.

2. The language of the new amendment is so ambiguous that it is doubtful whether it would support any action for a penalty, even if the amendment were within the scope of the powers of the board. The first sentence refers to barges towed abreast of each other, and says they shall have their signals, *as required by law*, placed in a suitable manner, etc. The last sentence of the regulation refers to a barge "when towed singly," and says that "said barge shall have the red and green light *required by law*, etc., not to be less than 10 feet above the water." Both these clauses seem to assume that the existing law required these colored lights upon barges. Read literally, neither clause provides for any lights not already "required by law;" but only regulates the manner of carrying such lights as are "required by law." This surmise has some support in a ruling which is said to have been made by the treasury department on July 28, 1882, holding that "barges" come within rule 8 of section 4233, as "sail-vessels," and that barges are therefore required, when towed, to carry colored lights. But, by the agreed state of facts in this case, it is manifest that the barges in question are not "sail-vessels," and are not within rule 8; for they have neither masts nor sails, nor any means of propulsion of their own. As there are no provisions of law which require lights upon such barges, the amendment of 1885, literally construed, would therefore fail of any effect, through its own limitations.

Again, the new regulation provides only for barges towed "side by side," and for a barge "when being towed singly." The present case is neither the one nor the other. Capt. Miller, the defendant, was

in charge of the forward barge in a line of four, all towed in single file by the Narragansett. If the forward barge can, by any supposed intention, be construed as within the phrase "being towed singly,"—that is, as distinguished from being towed "side by side,"—then the last clause would require that each one of the four should also have the red and green lights. But this is in evident conflict with the apparent analogy of the first clause, which seems intended to include the case of not merely one tier of barges side by side, but cases where there may be more than one tier, or even several tiers, side by side, as is usual in large tows of canal-boats. In such cases, the first clause of the new rule requires the colored lights on the bows of the "outside forward boat" only, not upon the outside of any of the following boats. Again, it is impossible to tell whether or not this amendment is designed to apply to barges towed along-side of tugs. Single barges are often towed in that way. The language of the last clause of the amendment is apparently as applicable to a single barge towed along-side as to a single barge towed upon a hawser astern.

It is unnecessary to consider the advantages or disadvantages that might attend the attempt to observe this new rule. In a line of four barges, as in this case, if the regulation were valid, and if all the four that were in tow, one after another, were required to exhibit these colored lights, the regulation would manifestly tend to produce confusion, and be liable to lead to disaster, as the defendant contends. The barges are usually towed upon hawsers separating them from each other and from the tug from 600 to 800 feet. Each barge after the first would be likely to be mistaken by other vessels for independent vessels bound to keep out of the way under the statutory rules, as circumstances might arise; because, under many circumstances, there would be no lights visible to others to indicate that the rear barges were not independent vessels. This case presents no analogy to a sail-vessel in tow of a steamer, which is required by rule 8 to carry colored lights; because there is no such common practice of towing a long line of sail-vessels on a hawser one after the other as is practiced with barges. The white lights on the steamer ahead indicate a tow, and the tow is seen in the colored lights on the sail-vessel behind, and there is no confusion. But several in line, like the barges in this instance, all carrying colored lights, and the hindmost nearly a half mile astern of the tug, would often, in thick weather, appear as independent vessels, when the steamer's white lights could not be seen, even if the present rule were well understood and attempted to be followed. Without pursuing this matter further, however, I am of opinion that the regulation of lights is not within the subjects committed to the board of supervising inspectors.

I greatly doubt, moreover, whether section 4500 authorizes a penalty for non-observance of a regulation of the supervising inspectors. The penalty is prescribed for a violation of "any provision of this title;" that is, a violation of some obligation created directly by that

title. This construction is sustained by the fact that many sections of this title provide specific, and, for the most part, much less severe, penalties for the violations of the regulations which the inspectors are authorized to make. See sections 4413, 4454, 4492.

The complaint must be dismissed.

---

(January 19, 1886.)

Upon appeal to the circuit court, the judgment was affirmed by the following memorandum:

WALLACE, J. I agree with the district judge in his conclusion that the amended rule of the board of supervising inspectors of February, 1885, (section 20, rule 3,) prescribing the character and location of signal lights to be carried by all barges in tow of steamers, is not a regulation to be observed by steam-vessels in passing each other, and is beyond the competent authority of the board of inspectors to establish.

The judgment of the district court is affirmed.

---

**TOBEY FURNITURE Co. v. COLBY and others.**

(Circuit Court, N. D. Illinois. November 16, 1885.)

**1. PATENTS FOR INVENTIONS—COMBINATION CLAIM—INFRINGEMENT.**

A claim for a combination of three elements is not infringed by the use of only two of them, where the omitted element has a function of its own not performed by the elements used in the device claimed to infringe.

**2. SAME—EQUIVALENTS.**

An inventor who is only an improver, and not the first in the art, is not entitled to invoke broadly the doctrine of mechanical equivalents, so as to cover devices not specifically claimed.

**3. SAME—WARDROBE BEDSTEADS.**

The patent to Blackmore and Green, assignees of Hand and Caulier, No. 204,321, of May 28, 1878, for wardrobe bedsteads, construed, and held not infringed by a bedstead made under the patent to Robert F. Meissner, No. 270,327, of January 9, 1883.

**In Equity.**

*Coburn & Thacher*, for complainant.

*Banning & Banning and Hutchinson & Partridge*, for defendants.

BLODGETT, J. This is a bill charging defendants with infringement of patent No. 204,321, issued May 28, 1878, to H. P. Blackmore and C. S. Green, assignees of C. Hand and Frederick Caulier, for an improvement in wardrobe bedsteads. The two chief features of the patent are an arrangement of folding doors which give the bedstead the appearance of a wardrobe when the bed is raised to an upright position and these doors are closed around it; and when the bed is let

down for use these doors fold back so as to form a paneled head-board, giving the whole structure the appearance of a canopied bedstead; while the other feature consists in an arrangement of vertical spiral springs which aid in raising the bed from a horizontal to a vertical position. These features are covered by the two claims of the patent, which are: (1) In a wardrobe bedstead the hinged folding sections, A, B, C, secured to the uprights, D, substantially as and for the purpose described. (2) The combination of body, E, rods or mandrels, F, having coiled springs, *f*, and links, G, substantially as shown and described.

Defendants' bedstead, which, it is claimed, infringes this patent, has folding doors which inclose the upper part of the bedstead when raised, and give it a wardrobe appearance, and which fold back to give the effect of a paneled head-board when the bed is down. In these respects the defendants' device accomplishes substantially the same result as complainant's; but the defendants use only two folding doors or hinged boards, while complainant uses, describes, and specifically claims three doors. As already said, defendants' two doors produce substantially the same general effect and result as the three used and described by complainant; but a study of the specifications of complainant's patent shows that for the purpose of producing the result aimed at by his device three doors were necessary; and it cannot, it seems to me, be accomplished by two doors. At all events, defendants do not use three to accomplish the purpose of their device.

One object of complainant's patent was to give the side supports of the upright frame a heavy, massive appearance; and this is done by the peculiar way in which the three doors are folded around the side supports. The patentee says:

"Our invention has for its primary object to provide a folding or wardrobe bedstead in which the head-board will form or serve as the bottom board of the bed or front of the wardrobe, and in which solid posts are simulated by means of hinged boards, thus materially reducing the expense of construction."

Inasmuch, therefore, as the inventors of complainant's device seem to have had a special purpose in the use of three hinged doors, or sections,—that is, to give the vertical standards or sides of the upright frame a solid, massive appearance when these sections were folded around the upright, D,—and, inasmuch as these three sections for the purpose described are specifically claimed, I am of opinion that the defendants' use of two folding sections, which accomplish part of, but not the entire purpose of, complainant's three sections, is not an infringement of this patent. Another evident reason for the use of the three folding sections in complainant's device was to form a casing or box for the concealment of the vertical springs which are used to help lift the bed to an upright position, a purpose not needed in the defendants' structure, as their springs are concealed in another way.

The second claim is for the vertical springs by which to aid in lifting the bed. Defendants use a spring seated in the lower part of the upright frame, and which, by means of a cord passing over an eccentric, utilizes the spring to aid in lifting the bed. If the inventors of complainant's device had been the first in the art to show the use of a spring to aid in lifting a turn-up or folding bedstead to a vertical position, and therefore entitled to invoke the doctrine of equivalents, I should deem the device used by defendants an infringement, as it is clearly an equivalent for that covered by complainant's claim; but the proof shows several prior patents for folding bedsteads in which an auxiliary lifting device is shown, and especially that shown in the patent to Maine, in 1869, is almost exactly reproduced in defendants' bedstead. I must, therefore, find that defendants do not infringe either claim of complainant's patent.

That defendants' bedstead is so much like that of complainant's as to be a dangerous, if not a successful competitor, is undoubtedly true; but I think this a clear case of an evasion, and not of the infringement, of a patent.

---

ROEMER v. NEUMANN and others.<sup>1</sup>

(*Circuit Court, S. D. New York.* December 30, 1885.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM.

Details of construction will not be construed to be essential features of a claim, in order to sustain its validity, where the claim does not in any way refer to such details, and the references thereto in the specification are merely recommendatory.

2. SAME—DEVICE SHOWN BUT NOT CLAIMED.

The drawings of the patent showed a lock-case having recessed or notched end-pieces, but no reference, in terms, to notches or recesses was found in the specification or claims. *Held*, that this fell far short of making the notches or recesses an essential feature of the claims.

In Equity.

*F. H. Betts, J. Van Santvoord, and W. C. Hauff*, for defendants.  
*Briesen & Steele*, for complainant.

WALLACE, J. The only question not disposed of at the hearing of this cause was whether the complainant is entitled to a decree because locks like that known as "Exhibit A, Infringing Lock," are an infringement of the patent. The locks like those known as "Exhibit Neumann, First Lock," "Exhibit Neumann, Satchel," and "Exhibit Neumann, Lock No. 2," were held not to be infringements. No doubt is entertained that this lock is, in all its essentials, similar to the lock made by the complainant and shown in the drawings of his patent, and no hesitation would be felt in pronouncing it an infringement if the claims of the patent were good.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

It is conceded by the counsel and by the expert for the complainant that unless the claims of the patent can be limited by construction so as to make end-pieces, provided with notches or recesses to hold handle rings or catches, constituents of the claims, they are void for want of novelty, in view of the prior state of the art. The invention which is the subject of the patent relates to improvements in the construction of lock-cases in the class of locks usually employed on the outer jaws of satchels, traveling bags, or similar receptacles, some kinds of which are made with notches or recesses so as to retain the handle rings of the satchel. The invention consists principally in forming the body of the lock-case with open ends, and in combining the same with cast blocks or end-pieces which are separately made in order to improve the lock-case in simplicity of form and reduce the expense of manufacture. The body of the lock-case is to be made of sheet-metal or other suitable material bent into a U form; the bottom of the case being open, and also the ends. The end-pieces, which are to be inserted into the body of the lock-case, in the specification are described as follows:

"B, B, are pieces of cast-metal or other suitable material constructed to fit into the open ends of the body, A, into which these blocks or plugs, B, B, are inserted, as clearly shown in figure 2. Each block, B, should have a shoulder, *d*, to limit the degree of its insertion into the shell, A, or of the insertion of the shell into the block. In use on a satchel or carpet-bag, the ends, B, B, after being inserted into the shell, A, or *vice versa*, in manner stated, are fastened to the satchel or bag by a bolt or pin that passes through an aperture, *e*, of the shell, A, and through a corresponding aperture, *f*, of the block, B; there being one such bolt or pin at or near each end of the piece, A; but the plugs or end-pieces, B, B, may also be secured by additional or separate bolts, if desired, and so also may the shell, A. The blocks, B, may also serve, if desired, to secure the ends of the handle or the catches which close the jaws of the bag, and for other suitable purposes."

The claims are as follows:

"(1) In a lock-case, the combination of the body, A, having open ends, with the end-pieces, B, B, that are applied thereto, substantially as herein shown and described. (2) The end-pieces, B, B, of a lock-case, made with shoulders, *d*, for defining their position relative to the body, A, substantially as and for the purpose specified."

There is no reference in terms, either in the specification or the claim, to notches or recesses in the end-pieces. The drawings, however, show the end-pieces formed with notches or recesses, and the patentee incidentally refers to a use to which the end-pieces may be applied in which inferentially the notches or recesses would be necessary. This falls far short of making the notches or recesses an essential feature of the invention. It cannot be doubted that the reference in the specification is to be treated merely as recommendatory of a form of lock-plate for a specified use, such as is shown in the drawing.

The claim is not fairly capable of the construction contended for by the complainant, and the bill must be dismissed.

**YALE LOCK MANUF'G Co. v. BERKSHIRE NAT. BANK and others.<sup>1</sup>**

(Circuit Court, D. Massachusetts. December 9, 1885.)

**1. PATENTS FOR INVENTIONS—ANTICIPATION.**

Defendant offered two witnesses, a rejected application, and models said to be constructed in accordance with the rejected application, to prove an anticipation; but the witnesses could not swear positively the alleged prior device embodied the patented features, nor that the rejected application described such device. The court found that the models offered did not correspond with the description in the rejected application, and it was not evident that the models introduced nor the alleged prior device were operative. *Held*, that an anticipation was not made out with the necessary clearness and certainty.

**2. SAME—LAPSE OF TIME—ABANDONED EXPERIMENT.**

In considering an alleged anticipation, the lapse of time, (17 years in this case,) and the fact that during that time nothing has been done by the alleged prior inventor, must be considered.

**3. SAME—LITTLE TIME-LOCK PATENT.**

The alleged prior device of Robert S. Harris, Dubuque, Iowa, *held*, to have been an abandoned experiment.

In Equity.

*Causten Browne and Edmund Wetmore, for complainant.*

*E. N. Dickerson and W. C. Cochran, for defendants.*

COLT, J. In this case Judge LOWELL, following the opinion of Judge SHIPMAN, held the first and seventh claims of the Little reissue patent, for improvements in locks for safes and vaults, to be valid. *Yale Lock Manuf'g Co. v. Berkshire Nat. Bank*, 17 Fed. Rep. 531; *Yale Lock Manuf'g Co. v. Norwich Nat. Bank*, 6 Fed. Rep. 377; S. C. 19 Blatchf. 123. The case is now before the court upon a rehearing on the ground of newly-discovered evidence relating to an alleged prior invention by Robert S. Harris, of Dubuque, Iowa, which it is claimed anticipates the Little device. The Little invention was for a time-lock, which would both lock and unlock at predetermined times. The defendants contend that in the year 1867, and prior to the invention of Little, Harris constructed a lock which would both lock and unlock at predetermined hours; that the first model he built was put upon a small wooden box in his house, and worked practically; that this model was soon after broken up, and a second model made, which remained for a short time in the First National Bank, in Dubuque, and was then sent to the patent-office with the application for a patent, which was made through Munn & Co.; that the application was rejected, and thereupon Harris, becoming discouraged, dropped the matter. To prove this, the defendants introduce two witnesses, J. K. Graves, a friend of Mr. Harris, and associated with him in the management of the bank, and also interested with him in the procurement of the patent, and Mrs. Harris, the wife of the inventor. It appears that Mr. Harris was too ill to give his testimony. The re-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.



jected application is also put in evidence by the defendants, and two models, constructed by them, which it is claimed are made substantially after the description and drawings of the application, and which are said to be operative machines.

While both Mr. Graves and Mrs. Harris say generally, in one part of their testimony, that the Harris lock would both lock and unlock at predetermined hours, when closely pressed neither is able to swear positively that such was the fact. Further, neither witness can testify with certainty that the lock described in the rejected Harris application is like the models they saw, though they believe them to be. Again, in our opinion, the two models, introduced by the defendants as made according to the description and drawings contained in the Harris rejected application, do not correspond in important particulars with such description and drawings. As, for instance, there is no provision for attaching the rear spring to the pin in the bolt, but the specification describes another and different mode of attachment. We are in doubt, upon the evidence, whether the original models made by Harris would both lock and unlock a door at predetermined times. We have not been shown that a lock constructed after the rejected application of Harris would operate, nor are we entirely satisfied that the modified models of the Harris device, introduced by defendants, would practically accomplish the result attained by Little. In the discussion of this alleged anticipation we should not lose sight of the fact that 17 years have elapsed since Harris made his two models, and his application for a patent was rejected, and that since then neither he nor Graves have ever moved in the matter.

For these reasons, we think the defendants have failed to establish an anticipation of the Little patent with that clearness and certainty which are necessary; and that, upon the proof before us, we must view the Harris lock as an abandoned experiment, and, consequently, as in no way affecting the validity of the first and seventh claims of the Little reissue. The former decree is affirmed.

THE PAVONIA.<sup>1</sup>

## HOBOKEN LAND &amp; IMP. CO. v. THE PAVONIA.

*(Circuit Court, S. D. New York. December 5, 1885.)***1. COLLISION—OBLIGATIONS OF FERRY-BOATS WHEN APPROACHING SLIPS.**

The ferry-boats Pavonia and Weehawken had slips on the New York side about 750 feet apart, that of the Weehawken being the lower. The location of the slips on the other side of the river was such that the courses of the two boats crossed. In consequence it was customary for the Weehawken to give the Pavonia, on the New York side, the right of way from the time she commenced to swing for her slip. When the tide was flood, the Pavonia usually commenced to swing for her slip when below it and to drift up with the tide. This sometimes made it more convenient for the Weehawken to go inside of the Pavonia and to keep up the river between the Pavonia and her slip. The collision occurred on the New York side, and about 200 feet from the entrance to the Pavonia's slip. The Pavonia had begun to swing for her slip before the collision occurred. The tide was flood, but the direction and force of the wind were such that it was not necessary for the Pavonia to go as far below her slip as was usual with the flood-tide. The Weehawken had been coming up the river at a distance of between 100 and 200 feet out in the channel, and was inside of and between the Pavonia and the line of slips at the time of collision. *Held*, that the Weehawken was not justified in departing from the established practice of the boats by which the Pavonia was entitled to the right of way to her slip, and was in fault in attempting to cross the bows of the latter vessel when swinging to her slip.

**2. RULE, IRRESPECTIVE OF USAGE.**

The case falls under the operation of the twenty-fourth rule of navigation, and the regulations of supervising inspectors do not apply. Irrespective of usage, general considerations of convenience and prudence demand that a ferry-boat having ample room to do so should keep out of the way of another about entering her slip, or in such close proximity to it that she has made her final preparatory movements to enter. If the circumstances require her to make a circuitous swing to conform to the varying condition of wind and tide, she should not be embarrassed by the presence of another boat in such close proximity to her as to involve risk of collision if any miscalculation or unforeseen emergency should occur.

**3. RULE AS TO SIGNALS.**

When the boat having the right of way fails to respond to the signal of the boat whose duty it is to keep out of the way, the latter has no right to assume, because of such silence, that the former abandons her right of way.

**4. DEFECTIVE LOOKOUT.**

When there are no obstacles in the way, the fact that the approaching vessel is not seen is all that is necessary to impute negligence on the part of the lookout. Both vessels having been negligent, and the collision having been caused thereby, the damages will be divided.

**In Admiralty.**

*Abbett & Fuller*, for libellant and appellant.

The Weehawken violated no rule or regulation in taking a course parallel to the line of slips and between the Pavonia and her slip before there was any danger of collision. The Weehawken, having seen the Pavonia's red light on her port bow before the latter had swung any considerable distance, had a right to assume that the Weehawken was at the same time seen by the Pavonia. The lights then being red to red it was the Weehawken's duty to go ahead. The collision was

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

caused by reason of the negligence of the Pavonia's lookout, and by her subsequent faulty maneuver.

*F. A. Wilcox*, for claimant and appellant.

The Weehawken knew the Pavonia's usual manner of entering her slip, and having seen her should have kept out of the way. The Weehawken was running too near the ends of the piers, and at a too high rate of speed. *The Edwin H. Webster*, 22 Fed. Rep. 171; *The Uncle Abe*, 18 Fed. Rep. 270; *The Maryland*, 19 Fed. Rep. 551; *The Favorita*, 8 Blatchf. 540; *The Chesapeake*, 1 Ben. 23. The Weehawken was in fault in leaving her slip without giving a warning whistle, and also in not giving any whistle until a collision was inevitable.

WALLACE, J. This libel is filed by the owners of the ferry-boat Weehawken to recover damages sustained by a collision between that boat and the ferry-boat Pavonia. The collision took place on the North river on the fifteenth day of October, 1883, at about 6:30 P. M., on a clear moonlight evening. The tide was strong flood, running three miles an hour, and there was a heavy north-west wind. There were no vessels or intervening obstacles to obstruct the movements of the ferry-boats from the time when they ought to have distinctly seen each other at a sufficient distance to avoid danger to the time of the collision. The Pavonia was making one of her regular trips from Jersey City down and across the river to her slip at Chambers street, and the Weehawken had left her slip at the foot of Barclay street to make one of her regular trips up and across the river to Hoboken. The slips of the two boats on the New York side were about 750 feet apart, the Barclay slip being the lower or southerly one.

The boats were each about 215 feet long. In making their trips each crossed the other's course, the slip of the Pavonia being below the slip of the Weehawken on the New Jersey side of the river. It was the custom between the boats to allow the right of way to the Pavonia from the time she commenced to swing for her slip. It was usual, however, when she was making her slip on the New York side with a strong flood-tide, for her to commence to swing below it sufficiently far in view of the existing tide and wind to drift upward into it with the tide, and this practice sometimes made it more convenient for the Weehawken to go inside the Pavonia and keep up the river between the Pavonia and her slip. Each boat was aware of the practice of the other, which was equivalent to an understanding between them that the Weehawken should keep out of the way when the Pavonia was swinging for her slip unless she was so far below her slip and so far out in the river that it was safe for the Weehawken to pass between her and her slip. The case turns mainly on the question whether, on the occasion in controversy, the Weehawken was justified in keeping up the river between the Pavonia and her slip, thus crossing the Pavonia's bow as she was about to swing for her slip, or whether it was the Weehawken's duty to keep out of the way by passing under the Pavonia's stern, or by stopping or reversing.

As the Pavonia left her slip at Jersey City the ferry-boat Secaucus was proceeding down the river about in the middle of the channel, and the Pavonia came abreast of her, and they proceeded abreast of each other for a short distance, when the Secaucus slowed and let the Pavonia cross her bow in order to reach the slip. The Pavonia was then about 600 yards from her slip, and thereupon the Pavonia made for the New York shore, swinging gradually from southerly to southeasterly, until, when somewhat below her slip, she began to swing sharply to the eastward to make the slip. Her slip was 200 feet wide, with two divisions, and she intended to make the upper division, as the lower division was occupied by her companion boat, the Delaware. Owing to the wind prevailing at the time, she did not go as far below her slip in order to swing up to it as she usually did on a flood-tide, and it was not necessary to do so.

The Weehawken emerged from her slip soon after the Pavonia passed across the bow of the Secaucus. The pilot of the Weehawken, assuming that the Pavonia would go further below her slip before swinging to drift upward on the flood-tide into her slip than she in fact did, supposed he could pass between the Pavonia and her slip before the Pavonia would be brought so near the Weehawken as to be perilous. He accordingly headed his boat to a southerly course. After he straightened on his course he signaled the Pavonia by one blast of his whistle that he would keep inside. That signal was not heard by the Pavonia. The pilot of the Weehawken, hearing no response from the Pavonia, immediately repeated his signal. This signal was not heard by the Pavonia, and the pilot of the Weehawken then blew an alarm whistle, and directed his engineer to stop and reverse, and ported his wheel. When this whistle was given the Pavonia was swinging easterly to the north-east for her slip; while the Weehawken, which had been going at nearly full speed, making with the flood-tide 12 miles an hour, was rapidly approaching the Pavonia on an intersecting course, and was so near the entrance of the Pavonia's slip that before her headway could be stopped she was almost opposite the slip and directly in the path of the Pavonia. The Weehawken had been coming up the river at a distance of between 100 and 200 feet out in the channel. The boats came into collision at a point about 200 feet off the southerly side of the lower division of the Pavonia's slip, the port bow of the Weehawken coming in contact with the starboard bow of the Pavonia.

The distance the two boats were apart at the time the Weehawken first signaled to the Pavonia cannot be reliably determined. It is very clear that the period of time intervening between that signal and the time of the collision was very short. Assuming that the Weehawken had made 750 feet from her slip when the boats came together, about 50 seconds intervened. But the proximity of the boats at the time of the first signal was probably considerably nearer than it would seem to be from calculations based on the time occupied by

the Weehawken in getting from her slip to the point of collision. The testimony of the Weehawken's pilot is that his signals were given with great rapidity. He thinks that not more than three seconds intervened between his first and second signals, and not more than two seconds between his second signal and his alarm signal, and that the alarm whistle was given within two seconds after giving his second signal. Of course accuracy is not to be predicated of such testimony, but his testimony shows very satisfactorily that but an extremely short interval could have elapsed between the time of the first signal and the collision. It is probable his first signal was not given until his boat had got out from 100 to 200 feet beyond the end of her slip and had got straightened on her southerly course up the river, and that less than half a minute elapsed between the time of this signal and the time of the collision. As the collision took place about 200 feet off the southerly end of the Pavonia's slip, it would seem that the Pavonia had commenced to swing sharply for her slip and was not more than three times her length from it when the first signal was given by the Weehawken.

The pilot of the Weehawken says he saw the red light in the Pavonia when he gave his first signal. The probability is that he saw this light as his boat was starting out of her slip, and, assuming the Pavonia to be far enough away for him to go inside, did not give his signal as soon as he thinks he did, and did not give it, in fact, until his boat was straightened on her course up the river. He probably was within two boat's length of the place of collision at the time. Under the circumstances the Weehawken was plainly in fault in departing from the established practice between the boats by which the Pavonia was entitled to the right of way to her slip, and in attempting to pass across the bows of the Pavonia just as she was swinging into her slip. The fault was aggravated by proceeding after having signaled the Pavonia and got no response. She had no right to assume, without an assenting signal from the Pavonia, that the Pavonia consented to abandon her usual right of way. Without such consent the Weehawken assumed the risk of departing from the usage between the boats, and of being able to justify her course by showing that it was safe under the circumstances. The regulations of the board of supervising inspectors do not apply to the case, because the boats had adopted a practice which was a law unto themselves. The case falls under the operation of the twenty-fourth rule of navigation, and a departure from the ordinary rules was required by a due regard to the special circumstances.

Irrespective of any usage, it should be held, upon general considerations of convenience and prudence, to be the duty of a ferry-boat having ample room to do so to keep out of the way of another just about entering her slip, or in such proximity to it that she has made her final preparatory movements to enter it, when the circumstances require her to make a circuitous swing against the tide to reach it.

The boat about to enter her slip under such circumstances must conform her movements to the varying conditions of the tide and wind, and is necessarily more or less circumscribed by the exigencies of the moment; and she ought not to be unnecessarily embarrassed by the presence between her and her slip of another boat in such proximity as to involve risk of collision if any miscalculation or unforeseen emergency occurs.

It is evident from the testimony of the Weehawken's pilot that his signal of one whistle was intended as a proposal to the Pavonia that he might pass inside. He expected an answer, and repeated his signal when the first was not answered. At the time his first signal was given the circumstances required him either to go outside or to stop and reverse. The boats were approaching each other in a direction and with a rapidity that rendered a collision highly probable, if not unavoidable, unless one or the other reversed, or unless the Weehawken gave the Pavonia the right of way to her slip. The Pavonia was also in fault. It was her duty while navigating this crowded channel to maintain a vigilant lookout. Especially was it her duty, being somewhat late on her own trip and knowing the usual time for the Weehawken to leave her slip, to be observant of the movements of the Weehawken. There was no efficient lookout on the Pavonia. The deck hand who is called the lookout was not acting as a lookout at the time. He had other duties to perform, and was not in the proper place for a lookout under the circumstances. He testifies that he was standing near the hood of the boat, between the cabin door and the end of the boat, and heard four sharp bells given, when he went forward to the bow of the boat and then saw the Weehawken for the first time. The boats were then close together. He testifies they were about 100 feet apart. The pilot, as he himself testifies, was necessarily occupied with his wheel from the time of commencing swinging to the slip. He did not see the Weehawken until her bow was just lapping on the Pavonia's water-wheel, and when his boat was half a length only from the Weehawken. There was no obstacle in the way of seeing the Weehawken all the time after she emerged from her slip to the time of the collision. The fact that she was not seen is all that is necessary to impute negligence to the Pavonia. If, after the Pavonia had commenced to swing for her slip, she had seen the red light of the Weehawken, as she should have done, indicating that the Weehawken was intending to pass inside, she could have been stopped and reversed, and the Weehawken would have got by the point of collision before the boats came in contact.

The decree of the district court dividing the damages is affirmed, with interest and costs.

THE ELLA B.<sup>1</sup>

AUSTIN and others v. THE ELLA B.

*(District Court, N. D. New York. January 16, 1886.)***MARITIME LIEN—HOME PORT—SUPPLIES FURNISHED VESSELS NAVIGATING CANALS—WESTERN AND NORTH-WESTERN LAKES—NEW YORK STATUTE CONSTRUED.**

If supplies are furnished in the home port, the duration and requisites of the lien depend upon the terms of the state statute. If the vessel be engaged in canal navigation, the specification of the debt must be filed in the office of the canal department; or if in lake navigation, her employment therein must be shown. The burden of proof is on the libellant. An occasional venture on a lake does not make the vessel a lake boat, if her size, equipment, and other circumstances indicate that such is not her usual employment.

In Admiralty.

*George S. Potter*, for libelants.

*Joseph V. Seaver*, for respondent.

COXE, J. The libelants bring this action to recover for supplies furnished to the steam-tug *Ella B.*, in her home port, during April and May, 1884, the statutes of New York providing for a lien in such cases. Specifications of the debt were filed in the Erie county clerk's office, February 2, 1885, upon the supposition that the tug was a vessel "navigating the western and north-western lakes," or one of them, pursuant to the provisions of the laws of New York for 1862 as amended in 1863. 3 Rev. St. N. Y. (7th Ed.) 2404, 2405, 2410.

It is admitted that the libelants cannot succeed, unless their proceedings can be sustained under the extended limitation provided by the amendment of 1863. If the *Ella B.* was not a vessel navigating the lakes, the libelants' debt ceased to be a lien at the expiration of six months after it was contracted, namely, in November, 1884. It is therefore incumbent upon the libelants to satisfy the court that the *Ella B.* was a vessel navigating Lake Erie. It seemed to be the theory of the respondent, upon the argument, that she was called upon to prove affirmatively that the tug was "used or fitted for the navigation of the canals," requiring the specifications of the debt to be filed with the canal department at Albany. This is not necessary. It is enough if the libelants fail to prove that she was a lake vessel.

The *Ella B.* is a tug of less than five tons burden. She is 35 feet in length and 10 8-10 feet beam. She is not provided with an anchor, compass, cooking apparatus, cabin or sleeping accommodations. Her bunkers hold but two or three tons of coal. The principal theater of her operations has been Buffalo creek and harbor, and the waters adjacent thereto. She has occasionally been out upon Lake Erie and the Niagara river, but never for more than a few hours at a time. She

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

has also navigated the canals in the vicinity of Buffalo as far as Tonawanda and Lockport. Since 1882 she has not been enrolled. 24 Fed. Rep. 508. She is emphatically a harbor tug, towing and shifting canal-boats and other vessels about the still waters of the harbor, but is entirely unfitted, by reason of her size, construction, outfit and limited capacity, to navigate the stormy waters of the lakes. As well might it be argued that a tug navigating New York harbor is an ocean-going vessel, because occasionally, in fair weather, she goes out beyond Sandy Hook.

It is thought that the law-makers in passing the amendment of 1863, relating to vessels navigating the western and north-western lakes, did not have in mind, or intend to provide for, a tug so diminutive in size that almost certain disaster would await her if she ventured beyond the Buffalo breakwater in stormy weather,—a tug without any of the tackle or appliances necessary for an extended trip upon the lakes,—a tug, in short, hardly less fitted to navigate the Atlantic ocean than Lake Erie.

The specific language of the statute, as well as the object which the legislature intended to accomplish, precludes the idea that it was ever intended to include such a vessel within its terms. But if the court should be inclined to adopt the view that because the tug had occasionally been out upon the waters of Lake Erie she was therefore a lake boat, it would not aid the libelants, for the respondent has introduced similar, and perhaps more satisfactory, proof, and has made use of similar arguments to prove that she was intended for the canals. If she was a vessel "built, used, or fitted for the navigation of the canals," it was necessary also to file the specifications of the debt in the office of the canal department at Albany, pursuant to the amendment of 1879. 3 Rev. St. N. Y. (7th Ed.) 2405. This the libelants have not done. It is entirely obvious that if the few occasions when she ventured upon Lake Erie at its extreme easterly end would justify the court in finding that she was a vessel navigating one of the north-western lakes, the larger number of occasions when she is proved to have been upon the Erie canal would require a finding also that she was "used or fitted" for canal navigation. There is no theory upon which the libelants can recover. The libel must therefore be dismissed, with costs.

The foregoing views compel the dismissal, with costs, of the libels filed by Mary A. Weller and James C. Austin.

In the case of David Bell the work was done and the materials furnished in April and May, 1885. The libel was filed in June of the same year. The libelant is therefore entitled to a decree for the amount demanded, with interest and costs, within the doctrine of *The Julia L. Sherwood*, 14 Fed. Rep. 590. The tug did not "leave the port at which such debt was contracted," within the meaning of the second section of the law.



UNITED STATES *ex rel.* ATTORNEY GENERAL v. PITTSBURGH & L. E. R. Co.*(District Court, W. D. Pennsylvania January 18, 1886.)*

## 1. NAVIGABLE RIVERS—BRIDGES—ACTION BY UNITED STATES.

The United States may maintain a suit to compel a company assuming to exercise the authority conferred by the act of Congress of December 17, 1872, (authorizing and regulating bridges over the Ohio river,) to comply with the provisions thereof, or to abate as a public nuisance an unlawful structure so erected, when an obstruction to navigation.

## 2. SAME—OBSTRUCTION—JURISDICTION OF DISTRICT COURT.

Litigation between the government and such company touching an obstruction to the navigation of the river, created by the construction of a bridge under said act, presents a cause within the terms of the sixth section, and hence is cognizable by the designated district court.

## 3. SAME—INFORMATION IN EQUITY—PROPER REMEDY.

In such case the appropriate remedy is by an information at the suit of the attorney general in equity.

## 4. SAME—ORDER OF SECRETARY OF WAR—DIKE.

A company proposing to construct a bridge over the Ohio river, under said act, submitted its designs, etc., to the secretary of war, who, pursuant to the provisions of the act, convened a board of engineers to examine the case, which board, after hearing the parties interested, recommended certain changes of location and plan, a dike 300 feet long being one of the new features so recommended. The company, accepting the recommendations of the board, modified its plan to conform thereto, and the same was approved by the secretary of war. Official notice of such approval having been given to the company, it proceeded to construct its bridge at the appointed location in accordance with the approved plan. After the piers were erected, and the superstructure almost finished, the secretary of war made an order directing the company to construct a dike 918 feet in length. *Held*, that the secretary of war had no authority to make that order, and the company was not bound to comply with it.

## In Equity.

Wm. A. Stone, U. S. Atty., for the United States.

D. T. Watson, for defendant.

ACHESON, J. While the jurisdiction of this court in this cause has not been called in question, but has been tacitly conceded by the defendant's learned counsel, it nevertheless is proper to examine the grounds upon which our authority rests. The subject-matter of the suit is a bridge constructed by the defendant over the Ohio river, near the town of Beaver, in the Western district of Pennsylvania, under the act of congress of December 17, 1872, (17 St. at Large, 398,) entitled "An act authorizing the construction of bridges across the Ohio river, and to prescribe the dimensions of the same;" the complaint, in substance, being that the defendant's said bridge has not been constructed in accordance with the limitations and provisions of said act, but in violation thereof; and that, as built and maintained, it is an unlawful obstruction to the navigation of said river, and a public nuisance. The sixth section of the act contains the provision following:

"And in case of any litigation arising from any obstruction, or alleged obstruction, to the navigation of said river, created by the construction of any

bridge under this act, the cause or question arising may be tried before the district court of the United States of any state in which any portion of said obstruction or bridge touches."

Now, congress having legislated on the subject of the erection and maintenance of bridges over the Ohio river, and defined what shall be a lawful structure, I cannot doubt that the United States may maintain a suit to compel a company, assuming to exercise the authority conferred by the said act, to comply with the terms thereof, or to abate as a public nuisance an unlawful structure so erected, when an obstruction to the free navigation of the stream. *Dugan v. U. S.*, 3 Wheat. 173; *U. S. v. Tingey*, 5 Pet. 115. And litigation between the government and such company, touching an obstruction to the navigation of the river created by the construction of a bridge under the said act, would seem clearly to present a cause within the terms of the above-quoted clause of the sixth section, and hence cognizable by the proper district court. But as an indictment against the bridge as a nuisance is not maintainable,—no such proceeding having been authorized by congress,—the appropriate remedy is by an information at the suit of the attorney general in equity, as here adopted. *State v. Wheeling Bridge Co.*, 13 How. 513; Story, Eq. Jur. § 921 *et seq.*; Wood, Nuis. 813.

Being thus assured of the jurisdiction of the court, I pass to a consideration of the merits of the case. As already stated, the bridge in question was erected under the above-recited act of congress, which prescribes the minimum height and width of the channel spans, and other requirements. The fourth section of the act provides that the person or company proposing to erect a bridge across the Ohio river shall submit to the secretary of war, for his examination, a design and drawings of the bridge and piers, and a map of the location, giving, for the space of at least one mile above and one mile below the proposed location, the topography of the banks of the river, the shore-lines, at high and low water, the direction of the current at all stages, and other specified particulars, and shall furnish such other information as may be required for a full and satisfactory understanding of the subject; "and, if the secretary of war is satisfied that the provisions of the law have been complied with in regard to location, the building of the piers may be at once commenced; but, if it shall appear that the conditions prescribed by this act cannot be complied with at the location where it is desired to construct the bridge, the secretary of war shall, after considering any remonstrances filed against the building of said bridge, and furnishing copies of such remonstrances to the board of engineers provided for in this act, detail a board, composed of three experienced officers of the corps of engineers, to examine the case; and may, on their recommendation, authorize such modifications in the requirements of this act as to location and piers as will permit the construction of the bridge, not, however, diminishing the width of the spans contemplated by this act: provided,

that the free navigation of the river be not materially injured thereby." The defendant company having submitted to the secretary of war the design and drawings for its proposed bridge and piers, and a map of the location, and remonstrances having been filed by those interested in the navigation of the river against the building of the bridge, the secretary, not being satisfied with the proposed plan, etc., detailed a board of engineers, conformably to the provisions of the act, to examine the case. That board, after visiting the ground and hearing the parties interested, made report to the chief of engineers, on August 15, 1877, which report was approved by the secretary of war on August 30, 1877. This report contains the following recommendations, viz.:

"And inasmuch as the river men whom they [the board] have consulted are almost unanimous in desiring that the bridge should be built further up stream, they would recommend that this be done, and that a site between 300 and 400 feet higher up be chosen, giving the company a margin of 100 feet in order to adapt their line to the ground in a manner as advantageous as possible. But, even with this change, the channel space will often be difficult to run, as tows, after flanking around the Phillipsburg point, cannot always straighten up in time to run straight through the channel space. For these reasons, the board would recommend that the channel space be increased to 425 feet in the clear, and that a smooth guiding dike, 300 feet long, be built up stream from the left channel pier. This dike should be as high as the 15-foot stage in the river, and should bend gently towards the bank, so as to reduce the space for water behind it, and to deflect the current into the channel space. The left channel pier should be placed 150 feet from the bluff bank. The span next north of the channel space should be also made a through bridge."

At a meeting of the board of directors of the defendant company, held September 5, 1877, the foregoing recommendations of the board of engineers were acceded to by the company; and a written acceptance thereof, signed by the president of the company, and under its corporate seal, was immediately transmitted to the secretary of war, by whom it was received and filed. On September 12, 1877, the defendant's engineer submitted a map exhibiting the plan and location of the proposed bridge, modified so as to conform to the above recommendations, to Maj. William E. Merrill, of the corps of engineers, and the officer in charge of the improvement of the Ohio river; who, finding it to conform to the above expressed views of the board of engineers, forwarded it to the chief of engineers, upon whose recommendation the secretary of war, on September 21, 1877, approved the modified plan and location as shown on said map; and official notice of such approval was communicated to the president of the defendant company on September 24, 1877. Shortly thereafter the company began the erection of the piers of the bridge at the changed location, in conformity with the modified plan. The piers were ready for the superstructure early in July, 1878, and the bridge (save the dike) was completed by September 21, 1878, on which day the first train ran over it. In the mean time, about June 12, 1878, after the piers

of the bridge were finished, the Pittsburgh Coal Exchange presented a memorial to Lieut. F. A. Mahan, corps of engineers, then having in charge the improvement of the Ohio river, setting forth that, since the erection of the channel piers of this bridge, it had been found that a dike of but 300 feet, as recommended by the board of engineers, would be "useless for the purpose demanded," and that it ought to be lengthened 700 feet. Maj. Merrill, having investigated the matter, on August 26, 1878, reported to the chief of engineers, as his opinion, "that a 300-foot dike will not suffice at this point, and that an extension of 618 feet is essential to the security of navigation;" and, upon the recommendation of the chief of engineers, the secretary of war, on September 4, 1878, made an order, which was served on the defendant company September 7, 1878, directing that the dike should be "extended to the main shore line 918 feet," and that the defendant company be required to make such extension. There is no satisfactory evidence that the defendant ever assented to this order, or agreed to comply therewith. Indeed, just the reverse is shown. The letter to Maj. Merrill, written by the company's chief engineer, on November 8, 1878, at least as explained by his testimony, does not import an undertaking to build a dike 918 feet long at the expense of the company; and, if it does bear such construction, he had no authority so to bind the company.

Whether the order of the secretary of war, made September 4, 1878, was obligatory upon the defendant is the most important question in this case, and the one first to be considered. So far as I am informed, or can discover, the secretary had no authority to make that order, unless it was conferred upon him by the act of December 17, 1872. But I search that act in vain for this authority. Certainly no express grant of such power to the secretary of war is to be found in the act, and I think no such implied authority is thereby given to him. It will be observed that the secretary had approved the recommendation of the board of engineers which prescribed a dike of only 300 feet in length, and the defendant had accepted that recommendation, and, as is shown, in all other particulars had constructed its bridge in strict conformity with the views of the board of engineers, which the secretary had finally approved on September 21, 1877. Now, by that approval, it seems to me the secretary exhausted his authority in the premises. At any rate, it was too late for him to withdraw or modify his approval after the company had acted upon it. It is true that the seventh section of the act provides that if "any change be made in the plan of construction of any bridge constructed under this act, during the progress of the work thereon, or before the completion of such bridge, such change shall be subject to the approval of the secretary of war." But this implies a voluntary change by the party erecting the bridge. The sanction of such change is a very different thing from a compulsory order modifying an approved and adopted plan of construction. Moreover, by the terms of the act,

there is an express reservation to congress of the right to direct any alteration of any bridge constructed under the act at the expense of the owners thereof. And this reservation negatives the idea that the secretary of war was invested by the act with the authority which he undertook to exercise by his order of September 4, 1878.

The conclusion thus reached finds confirmation in subsequent legislation. By the eighth section of the act of congress of July 5, 1884, (St. First Sess. Forty-eighth Cong. 148,) it is enacted that whenever the secretary of war shall have good reason to believe that any railroad or other bridge, constructed or to be constructed over any of the navigable waters of the United States, is an obstruction to the free navigation thereof by reason of difficulty in passing the draw opening or raft span by rafts, steam-boats, or other water-craft, the secretary, on satisfactory proof thereof, shall require the company, or persons owning such bridge, at their own expense, to provide aids to navigation in the form of booms, dikes, piers, and other suitable structures for the guiding of rafts, steam-boats, and other water-craft through such opening or span; and in the case of the failure of such company or persons, within a reasonable time, so to do, the said secretary shall cause such additional structures to be built, the cost thereof to be recovered by proceedings instituted in the name of the United States, etc. This, it would seem, was the first general law which clothed the secretary of war with such power; and, for want of then existing authority in him to make the order of September 4, 1878, it was not binding upon the defendant, and cannot be enforced in this suit, nor can the defendant's bridge be adjudged an unlawful structure by reason of the company's failure to obey that order.

I reach this conclusion with the less reluctance because of the above-recited law of July 5, 1884, the provisions of which seem completely to cover the case of the defendant's bridge, affording a simple and ample remedy for the grievance here complained of. In this connection it may be remarked that the act of December 17, 1872, expressly reserves to congress the right of amendment by such a law as that of July 5, 1884, so as to prevent or remove obstructions to the navigation of the river, without any pecuniary liability on the part of the government on account of such amendment of said act.

As it is shown, and indeed is admitted, that since this suit was commenced the defendant has removed the "rip-raps," forbidden by the third section of the said act of 1872, and all the obstructions to navigation mentioned in the eighth paragraph of the bill, that branch of the case requires no discussion.

There remains, then, for present consideration, only one other matter, viz., the "smooth guiding dike 300 feet long," which, beyond contestation, the defendant company became bound to construct. That dike has not been constructed either in whole or in part. The company excuses itself for not building it on the ground of the controversy which sprang up as to the kind of dike to be constructed,

the government officials insisting upon a dike conforming to the order made by the secretary of war on September 4, 1878; and if the fact of such controversy be not, in strictness of law, and for all purposes, a full justification to the defendant, it at least relieves the company from any charge of willful default. The defendant was always willing and ready to build the dike as originally recommended and decided on. Indeed, in the contract for its bridge such a dike was included. That dike, however, was to "bend gently towards the bank, so as to reduce the space for water behind it." But the substitution of a dike 918 feet long involved a change in the shape and location of the first 300 feet running up stream from the left channel pier, as appears from the letter on that subject from Lieut. Mahan to the defendant's engineer, and otherwise. Nevertheless, the defendant company, in its answer, avows its willingness and readiness to build, at its own expense, the first 300 feet of the longer dike on the new line. But whether it be desirable now to enter a decree to that effect admits of grave question, in view of the possible injurious result to navigation from constructing only 300 feet of dike. Among the proofs here, is an official report touching this bridge of a board of army engineers, dated October 25, 1883, in which is expressed the opinion that "it is inexpedient, in the interests of navigation, to build a guiding dike until means are available for giving it the full length of about 918 feet." In view of that opinion, sustained as it is by other evidence, and the bearing which the act of July 5, 1884, has upon the whole case, the court will forbear making any order until the government shall be further heard in the matter.

---

### UNITED STATES *v.* MAXWELL LAND GRANT Co. and others.<sup>1</sup>

(*Circuit Court, D. Colorado.* January 25, 1886.)

1. PUBLIC LANDS—MAXWELL LAND GRANT—EFFECT OF AFFIRMANCE BY CONGRESS OF SURVEYOR GENERAL'S REPORT—GRANT DE NOVO.

The surveyor general having stated that a grant was made of a tract with certain boundaries named, that he considered it a good and valid grant, and recommended its confirmation, and congress having thereupon confirmed it, such confirmation, according to the principle of *Tameling v. Freehold Co.*, 93 U. S. 644, was equivalent to a grant *de novo*.

2. SAME—EFFECT OF SURVEYOR'S MISTAKE.

When boundaries of a grant are described, if the surveyors, without intending wrong, err in the application of the description to the surface, and so run the lines as to include a large tract not in fact within the grant, the government is not without remedy, even after grant.

3. SAME—EVIDENCE OF FRAUD SUFFICIENT TO WARRANT CANCELLATION OF PATENT—SUSPICION.

After the issue of patent no mere suspicion will justify its cancellation. The proof of wrong or mistake should be clear and satisfactory.

4. SAME—EVIDENCE OF FRAUD—PRIVATE SURVEY.

The procurement of a private survey, and the filing of the plat thereof with the land department, is no evidence of fraud or wrong-doing of the party concerned therein.

<sup>1</sup> Affirmed. See 7 Sup. Ct. Rep. 1015. 1271 See, also, 21 Fed. Rep. 19.

5. SAME—EFFECT AS TO FRAUD OF EFFORTS IN ONE'S OWN BEHALF.

A party cannot be adjudged a wrong-doer who simply asserts the full extent of the title he believes he has, and resorts to the only means left to him of ascertaining its true limits.

6. SAME—CASE OF THE GOVERNMENT NOT PROVED.

While the absolute correctness of the government survey of the grant may not have been demonstrated, the government has failed to show that it is not correct, and the probabilities are that it corresponds as nearly to the limits of the original grant as can ever be ascertained.

On Final Hearing.

*Wm. A. Maury*, Asst. Atty. Gen., U. S., *H. C. Hobson*, Dist. Atty., and *J. A. Bently*, for complainant.

*Frank Springer*, *Bela M. Hughes*, and *Chas. E. Gast*, for defendants.

*Brewer, J.* This is a bill filed by the government to set aside the patent to what is known as the "Maxwell Land Grant." The complainant rests its case upon two propositions: *First*. It claims that the extent of the original concession was only 22 square leagues, or about 96,000 acres, while the patent includes over 1,700,000 acres. This question was presented to me upon demurrer to the bill, and I then ruled upon it adversely to the government. The case is now submitted to me with all the testimony, and upon final hearing.

The learned counsel for the government have challenged my ruling, and again argued the question with zeal and ability. Notwithstanding, my opinion remains the same. I might properly leave the question to rest upon the considerations stated in the opinion then filed; yet, in view of the importance of the question, and the ability and earnestness of the reargument, I may be excused if I add something to what has already been said. In that opinion I rested my ruling upon the decision of the supreme court in the case of *Tameling v. Freehold Co.*, 93 U. S. 644. I held that case to be in point, and, if so, of course compelling the same conclusion. Counsel now both challenge that decision and also deny its application, seeking to distinguish the two cases. Of course I can entertain no thought of questioning that decision. If the supreme court have mistaken the law, they, and they alone, can correct the mistake. The circuit court must follow its superior, and that, too, not with any carping spirit or desire to evade the full force of any of that court's decisions. In the *Tameling Case*, which was a case in which the out-boundaries of the grant known as the "Sangre de Christo" grant included a tract largely in excess of the 22 leagues which it is claimed was, under the Mexican colonization law, the limit of the legal grant, the supreme court held that the act of congress confirming the grant was as effectual as a grant *de novo*, and conveyed the title to the whole tract. I quote its language:

"It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before congress for its consideration and action. We need only say that

he distinctly set forth that Luis Lee and Narciso Beaubien, September 27, 1843, petitioned the then civil and military governor of New Mexico 'for a grant of land in what is now the county of Taos, embracing the Costilla, Culebra, and Trinchera rivers, including the Rito of the Indians, and Sangre de Christo to its junction with the Del Norte river;' that the petition was referred by the governor to the prefect, with instructions to give the possession asked for by the petitioners; that they were put in possession, with the boundaries contained in the petition, 'vesting in them, their children and successors, a title in fee to said lands.' After stating that by the death of one of the grantees his heir at law, Charles Beaubien, inherited the undivided half of the land, and that he acquired the remainder from the administrator of the other grantee, the surveyor general reaches the conclusion that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition. The grant was approved and recommended for confirmation by congress. Congress acted upon the claim 'as recommended for confirmation by the surveyor general.' The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract. The plaintiff in error insists that under the Mexican colonization laws, in force when the grant was made, not more than 11 square leagues for each petitioner could be lawfully granted. As there were in the present instance but two petitioners, and the land within the boundaries in question is largely in excess of that quantity, the invalidity of the grant has been earnestly and elaborately pressed upon our attention. This was matter for the consideration of congress, and we deem ourselves concluded by the action of that body. The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal. In *Ryan v. Carter*, 93 U. S. 78, we recognized and enforced, as the settled doctrine of this court, that such an act passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by law, as well as by a patent pursuant to law."

Counsel for the government concede that the proceedings in the two grants, up to the report of the surveyor general to congress, are substantially alike. The admission is too narrow. The prior proceedings in respect to the Maxwell grant much more clearly indicate an intent to grant the entire tract. The petition was for *the* tract of land described by the boundaries, "to be divided equally between us." In the *Sangre de Christo Case* the petition, after stating that petitioners had examined the tract "embraced within the Costilla, Culebra, and Trinchera rivers, including the Rito of the Indians, and the Sangre de Christo to its junction with the Del Norte river," prays the governor "to grant us the possession of a tract of land to each one, within the aforementioned boundaries." Both petitions were sustained, and the grants ordered accordingly, no description of amount of land or boundaries being given in the orders. So, upon the face of the papers, it could with more force be asserted that the intent in the *Maxwell Case* was to grant the entire tract. Further, in the *Maxwell Case*, and in that only, objections having been interposed to the grant, the matter was referred to the departmental assembly, and the grant was by it confirmed as according to report, not alone for the benefit of the grantees, but also for the sake of the colony which they proposed to place upon it.



But assuming perfect similarity between the two cases up to the surveyor general's reports, how does the matter then stand? Both confirmations were by the same act of congress,—an act approved June 15, 1860, "To confirm certain private land claims in the territory of New Mexico." The first section, which is the confirming section, reads as follows:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that the private land claims in the territory of New Mexico, as recommended for confirmation by the surveyor general of that territory, and in his letter to the commissioner of the general land-office, of the twelfth of January, 1858, designated as Nos. 1, 3, 4, 6, 8, 9, 10, 12, 14, 15, 16, 17, and 18; and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract of returns of the surveyor general as No. 16,—be, and they are hereby, confirmed: provided, that the claim No. 9, in the name of John Scolley and others, shall not be confirmed for more than five square leagues, and that the claim No. 17, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants."

Claim No. 4 is the *Sangre de Christo* grant, and No. 15 the grant in controversy. The act, it will be perceived, confirms the claim "as recommended for confirmation by the surveyor general." The recommendation in the *Sangre de Christo Case* is as follows:

"The grant being a positive one, without any subsequent conditions attached, and made by a competent authority, and having been in the possession and occupancy of the grantees and their assigns from the time the grant was made, it is the opinion of this office that the grant is a good and valid one, and that the legal title vests in Charles Beaubien to the land embraced within the limits contained within the petition. The grant is therefore approved by this office, and transmitted to the proper department, with the recommendation that it be confirmed by the congress of the United States."

In the *Maxwell Case*, "the grant, having been confirmed by the departmental assembly, and been in the constant possession of the grantees from the date of the grant until the present time, as is proven by the testimony of witnesses, it is the opinion of this office that it is a good and valid grant, according to the laws and customs of the government of the republic of Mexico and the decision of the supreme court of the United States, as well as the treaty of Guadalupe Hidalgo, of February 2, 1848, and is therefore confirmed to Charles Beaubien and Guadalupe Miranda, and is transmitted for the action of congress in the premises."

In both cases the grant is recommended for confirmation, not a grant. In both cases the prior recitals show a grant of the entire tract,—of a tract within the out-boundaries. In both cases it is obvious that the out-boundaries included much more than 22 leagues, though in neither was the exact area known. Counsel notice these differences. In the *Tameling Case* the surveyor general, prior to his recommendation, states that "the justice of the peace, Jose Miguel Sanchez, placed the parties in possession of the land, with the boundaries contained in the petition, vesting in them, their children and

successors, a title in fee to said lands. While in this case the statement is simply that the justice of the peace placed the parties in possession of the land granted, I cannot see how this difference affects the question or limits the scope of the recommendation. The reason for the difference is obvious from facts heretofore stated. The grant in the one case was of a tract *within* certain boundaries, and the other of a tract *with* certain boundaries. Juridical possession alone defined the boundaries of the former, and, of course, the fact, extent, and effect of such act were necessarily more important.

Again, in the *Tameling Case*, in justification of his recommendation, the surveyor general states:

"The supreme authorities of the remote province of New Spain, afterwards the republic of Mexico, exercised from time immemorial certain prerogatives and powers, which, although not positively sanctioned by congressional enactments, were universally conceded by the Spanish and Mexican governments; and, there being no evidence that these prerogatives and powers were revoked or repealed by the supreme authorities, it is to be presumed that the exercise of them was lawful. The subordinate authorities of the provinces implicitly obeyed these orders of the governors, which were continued for so a long period, until they became the universal custom or unwritten law of the land, wherein they did not conflict with any subsequent congressional enactment. Such is the principle sanctioned by the supreme court of the United States, as expressed in the case of *Fremont v. U. S.*, 17 How. 542, which decision now governs all cases of the same nature."

Nothing of the kind appears in this case; but the Tameling report was made some months before this. The reasons having been once given, what need of incorporating them in every report? If the opinion of the surveyor general had changed as to the law, or if this case did not come within the scope of that rule, we should expect express notice and declaration thereof. But these are preliminary matters. The main fact is that he states that a grant was made of a tract with certain boundaries, which he gives; that he considered it a good and valid grant, and recommends its confirmation. Congress, acting on that recommendation, confirms it. The *Tameling Case* declares such confirmation equivalent to a grant *de novo*. It seems to me that ends the controversy.

I make no further comment on this question, simply referring for additional discussion of it to the opinion filed on the demurrer.

*Secondly.* Assuming that the act of congress confirmed the grant as of the entire tract within the out-boundaries, the government insists that the patent includes some hundreds of thousands of acres outside those boundaries, and that such excess was obtained by fraud and mistake. This question was also presented and considered before; not then as a question of fact, but one of law. The defendant claimed that as the fraud charged in the bill was imputed to the surveyors alone, and no improper relations asserted between them and the defendants, the government could take no advantage of this wrong on the part of its officers; that, if any mistake was made in the sur-

vey, it was made by government officers; and that, as the government assumed the right of making a survey, it took all the risks of mistake, and therefore that after patent the government was concluded, and could claim nothing by reason of any wrong and mistake of its agents and officers. I ruled against the defendant on these propositions.

Since the decision of the demurrer, and in the case of *U. S. v. Minor*, 114 U. S. 233, S. C. 5 Sup. Ct. Rep. 836, the supreme court has held that, where a patent has been obtained by fraud and imposition on the part of the claimant, the government is entitled to relief as against him. I quote from the opinion:

"When, therefore, he [the claimant] succeeds by misrepresentation,—by fraudulent practices aided by perjury,—there would seem to be more reason why the United States, as the owner of the land of which it had been defrauded by these means, should have remedy against that fraud,—all the remedy which the courts can give,—than in the case of a private owner of a few acres of land on whom a like fraud had been practiced; \* \* \* but in proceedings like the present,—wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury—it is enough to hold that it conveys the legal title; and it would be going quite too far to say that it cannot be assailed by a proceeding in equity, and set aside as void, if the fraud is proved, and there are no innocent holders for value. We have steadily held that though, in the absence of fraud, the facts were concluded by the action of the land department, a misconstruction of the law, by which alone the successful party obtained the patent, might be corrected in equity, much more when there was fraud and imposition."

It follows from this that if there be intentional wrong on the part of the surveyors, known to the claimants, although not incited by them, the same rule applies. I go further, and hold, as I did on the demurrer, that when the the boundaries of a grant are described, if the surveyors, without intending wrong, err in the application of the description to the surface, and so run the lines as to include a large tract not in fact within the grant, the government is not without remedy, even after patent. No trifling errors, it is true, will justify interference with the patent. And if the calls in the description are indefinite, such that they may be answered in two or three ways, doubtless the decision of the land department would conclude the government. There would then exist a question of fact only, committed to that department, and the decision of that tribunal would be without appeal, and not subject to review. It may also be added that after the issue of patent no mere suspicion will justify its cancellation. The proof of wrong or mistake should be clear and satisfactory. Sanctity of legal titles calls for this; the good faith of the government requires it. Now, what is the testimony by which the government has sought to establish its charges of fraud and mistake? A large volume has been taken. Most careful and thorough surveys and resurveys have been made. A score or more of plats and maps have been prepared with the utmost pains, and embracing the most

minute details. No expense has been spared. The government has, as it ought to have done, in view of the magnitude of the interests involved, as well as the gravity of the charges it made, been most diligent in collecting and producing every fact which could throw light upon the questions. All these have been placed before me, supported by arguments of exceptional force and clearness, and showing perfect mastery of all details. I have given long and patient study, and the conclusion to which I have arrived is in my own mind perfectly clear and satisfactory. I cannot, of course, review the testimony of the various witnesses. The limits of an opinion forbid; nor can I, without incorporating some of the plats, make perfectly clear to others the arguments which to me are convincing. All I can hope to do is to notice some of the more salient features of the case, and the facts which are most patent and potent.

The original petition of Beaubien and Miranda, in January, 1841, as translated, contains this description :

"The tract of land we petition for to be divided equally between us commences below the junction of the Rayado river with the Colorado, and in a direct line towards the east, to the first hills, and from there running parallel with said river Colorado, in a northerly direction, to opposite of the point of the Una de Gato; following the same river along the same hills, to continue to the east of the said Una de Gato river to the summit of the table-land, (*mesa*;) from whence turning north-west to follow along said summit, until it reaches the top of the mountain which divides the waters of the rivers running towards the east from those running towards the west; and from thence following the line of said mountain in a southwardly direction, until it intersects the first hills south of the Rayado river; and following the summit of said hills towards the east, to the place of beginning."

The report of CORNELIO VIGIL, the justice of the peace who in 1843 gave juridical possession, states that he "proceeded to erect the mounds according as the land is described in the accompanying petition, and which corresponds with the plat, to which I attach rubric; and commencing on the east of Rayado river a mound was erected; from whence, following in a direct line in an easterly direction to the first hills, another mound was erected at the point thereof; and, continuing from south to north, on a line nearly parallel with Red river, a third mound was erected on the north side of the Chicorica or Chacuaco *mesa*, (table-land;) thence, turning towards the west and following the side of the said table-land of the Chacuaco to the summit of the mountain, where the fourth mound was erected; from thence, following along the summit of the said Main ridge, from north to south, to the Cuesta del Osha, 100 varas north of the road from Fernandes to the Laguna Negra, where the fifth mound was erected; from thence, turning again to the east towards Red river, and following along the southern side of the table-lands of the Rayado and those of Gonzalitos, on the eastern point of which the sixth mound was erected; from whence, following in a northerly direction, I again reach Rayado river on its western side, where the seventh and last

mound was erected opposite to the first, which was erected on the eastern side."

With this report was filed a *desino* or sketch map of the grant, quite rude and inartistic, it is true, but giving, in a rough way, the outlines and form of the tract. The survey of Elkins and Marmon, upon which the patent was based, was made in the fall of 1877, more than 36 years after the original grant, and more than 34 years after the giving of juridical possession. Now, in determining whether this survey is correct, obviously several distinct lines of testimony are possible. *First*. By ascertaining the correct geographical location of the places, streams, etc., mentioned, and the correct topographical conditions referred to in the description, and inquiring whether the lines of survey fully and accurately respond to such calls. *Second*. By comparing the rude *desino* or sketch map with the plat of the survey. *Third*. Evidence of the continued existence and location of the mounds erected by the justice of the peace at the time of giving juridical possession. *Fourth*. In the case of the disappearance of such mounds, testimony of witnesses who saw them erected as to their location. *Fifth*. Comparison of the lines of survey with the boundaries of other grants made at or near the same time. *Sixth*. The extent of the actual occupation and claim of possession and title during the intervening years on the part of the claimants. These are the principal lines of inquiry.

At the outset, this fact is prominent: there is no minuteness of description in the original papers; the language is vague and general. Nor is this to be wondered at. The parties were dealing with a tract almost an empire in size, in a region of country unoccupied, but little known, and deemed of but trifling value. The donor was willing that the donees should take almost anything they desired, looking for consideration only to the occupation and development of this outlying territory. Again, it must be remarked that no serious challenge is made of the west and south lines of this survey. The questions are concerning the east and north lines, especially the latter.

Coming now to these lines of inquiry, in the grant the line commences at the first hills east of the Colorado river, below its junction with the Rayado, "and from there running parallel with said river Colorado, in a northerly direction to opposite the point of the Una de Gato; following the same river along the same hills, to continue to the east of said Una de Gato river to the summit of the table-land; from whence, turning north-west, following along said summit until it reaches the top of the mountain, which divides the waters of the rivers running east from those running towards the west."

In the certificate of juridical possession, after stating the erection of a mound at the first hills, the description reads:

"And continuing from south to north, on a line nearly parallel with Red river, a third mound was erected on the north side of the Chicorica or Chacuaco *mesa*, (table-land;) thence turning towards the west, and following along

the side of the said table-land of the Chacuaco to the summit of the mountain, where the fourth mound was erected."

The language of these two descriptions is not the same. Juridical possession was like feoffment at common law,—both a delineation of boundaries and an investiture of title. Under these circumstances, in case of conflict between the two, the juridical possession would control, at least, so far as it operated to reduce the extent of the tract conveyed. I notice the difference, however; as the language in the grant was doubtless the basis of the Griffin survey in 1870, of which I shall have more to say hereafter.

On the *desino* heretofore referred to, the Colorado, which is the principal stream within this tract, runs in a northerly course from the south-east corner about three-quarters the length of the tract, then bends sharply to the west. At this bend the Una de Gato is represented as continuing northerly in about the same direction as the Colorado below the bend. The east line of the tract is straight, and substantially parallel with the Colorado and the Una de Gato, to the north-east corner. As a matter of fact, by all the testimony, the stream which has been known all these years as the Una de Gato does not enter the Colorado at the bend, and does not run in a northerly direction, but branches off about midway between the north and south lines of the tract, and runs in a north-easterly direction. Following the language of the grant, Griffin, in his survey, did not make his east line continuously straight; but turning eastward, just below the mouth of the Una de Gato, followed the hills to the south and east of it, and so included some 100,000 and more acres in the tract. Elkins and Marmon, in obedience to instructions from the surveyor general, run their east line in a straight course, and so as to exclude this Una de Gato body of land.

Counsel for defendants insist that this action of the surveyor general and the surveyors was erroneous, and that the grant really included this body of land. Of course, even if their claim was beyond doubt, no relief could be given them in this action. I notice it to show that, in making its official survey, the government did not follow a course which might be justified by the words of the grant, but kept to the narrower boundaries indicated by the description in the certificate of juridical possession and the accompanying *desino*. Of this, of course, plaintiff is in no position to complain; but after all, the bone of contention is the location of the north-east corner. By the grant it was to be found by following the hills east of the Una de Gato to the summit of the table-land. In the juridical possession certificate it is located on the north side of the Chicorica or Chacuaco mesa. Where was the Chicorica or Chacuaco mesa, as known in the days of this grant? There is some testimony tending to show that there were two mesas which at times passed by the name of "Chicorica,"—the large and the small Chicorica mesa. Obviously the small mesa, even if generally known as the Chicorica, was not the place re-

ferred to by the justice, VIGIL, as it is below the bend of the Colorado. Many witnesses testify as to their understanding of the location of the *Chicorica mesa*. Perhaps a brief consideration of the general topography of the country will assist. At about the line between Colorado and New Mexico, from the main northern and southern range of mountains, a spur or ridge runs eastward, known as the Raton mountains. A short distance west of the east line of the grant is the Raton pass, now traversed by the Atchison, Topeka & Santa Fe railroad track. A little east of this is a high peak known as "Raton" or "Fisher's" peak. This is on the north line of the survey. From this, looking south-easterly, there appears, according to the testimony, an extensive plateau, descending as you move south and east. From the vicinity of the peak it seems to be a continuous plateau, but upon crossing it it is found to be broken by canons into plateaus. On the northern slope or ridge of this extended body of plateaus is the north-east corner-stone of the survey. In the canons which break up this tract into separate plateaus the various branches of *Chicorica* creek head. These various plateaus now pass by different names, though there is not perfect certainty or harmony between the witnesses as to the names applied to them. What more natural at that early day, when this country was seldom visited, its topography ill-known,—when it was known, however, that *Chicorica* creek headed somewhere in this tract, and when from such an elevation as Fisher's peak, near the mouth of one of the traveled passes, there seemed stretching away to the south and east this large plateau,—than that the whole of it should be known as the "*Chicorica Mesa*." So some of the witnesses testify, and their testimony accords with inherent probabilities. Again, while some limit the name "*Chicorica*" to the southern portion of the tract above referred to, and say that the northern part is known as the "Raton," the "Ahogedra," or "San Francisco" *mesa*; yet it is clear that at least the last two names are of later date than the grant. Again, the language of both the grant and the juridical certificate indicates the northern position of the table-land as the true north-east corner. By the grant the line is to follow the hills east of the *Una de Gato* to the summit of the table-land. As the general trend from Fisher's peak is downward to the south and east, the summit would be reached only at the northern edge. By the juridical certificate the mound was erected on the north side of the *Chicorica* or *Chacuaco mesa*, and thence the line turned towards the west, and followed the side of the table-land to the summit of the mountain. One would naturally infer from this that the mound was located on the northern slope of the highlands, and that the north line ran along the same slope of the Raton range to the summit of the continental chain. Further, though perhaps less satisfactory, as being evidence of a later date, the economic and geologic maps of Colorado, prepared and issued by the interior department from the surveys of Prof. Hayden, locate the *Chicorica mesa*

north of the Colorado line, and where the north-east corner-stone was fixed by the survey. The same is true of Nell's topographical and township map of Colorado, which purports to be compiled from government surveys.

I do not know that further detail on this point would be of any value. The location and extent of the *Chicorica mesa* are not established beyond doubt. The probabilities are that the name was applied to the whole country, whose general trend, as I have stated, was down from Fisher's peak to the south and east, and not to any particular plateau into which that tract is broken by the various canons. Indeed, the general application of this term to the whole tract is made more obvious by its connection with the Chacuaco; for the Chacuaco creek was 15 to 20 miles east of Fisher's peak, and the term "*Chacuaco Mesa*" was, at least in the later days, applied to the lower portion of this descending tract in the vicinity of the creek. One thing is clear: it is not proven that any other tract, or any particular plateau of this tract, was known as "*Chicorica Mesa*." So that, if it cannot be affirmed that the description demonstrates the correctness of the survey, the latter is certainly consistent with the former, so far as any conclusion can be reached from the testimony as to the location of *Chicorica mesa*.

*Second.* The *desino* throws some light on the question, mainly as indicating that the eastern boundary was a straight line, to that extent making against the Griffin survey; and the deflection to encompass the Una de Gato and its hills. It also suggests this. From the fact that about the only geographical features disclosed within the limits are the water-courses, and from those as shown on the plat, it is apparent that the purpose was to include the country watered by the upper Colorado and its branches, and that the country watered by the Animas river and its branches, was not thought of. It does not, however, conflict with the idea that the northern boundary was to extend to the very edge of the table-lands north of the Raton mountains, as indicated by other testimony.

The third and fourth matters may be considered together. Here we have positive testimony. Jesus Silva was one of the party who went with the justice, VIGIL, when juridical possession was given, and the only living member of that party. He testifies to his traveling with them; locates the north-east corner where the government survey fixed it; testifies that he pointed out the mound twice in 1870 to Griffin, who rebuilt it; and that he pointed out the rebuilt mound in 1877 to Elkins and Marmon. Richens L. Wooten, who was not of VIGIL's party, testifies that he was present, and saw this north-east corner located, and he positively identifies it. The testimony of these witnesses is hard to disbelieve. It is true they do not agree fully as to the circumstances under which VIGIL's party met Wooten; nor is this strange, testifying after the lapse of forty years; but they do agree as to the location of the mounds. The recollection of these



witnesses is as distinct, and their narration of the general facts respecting VIGIL and his party, the location of the mounds, and the grant of juridical possession apparently as accurate, as could be expected in respect to so remote a transaction. If they are to be believed, there is an end to the controversy. Other testimony shows that Silva at that time was in the employ of Beaubien, one of the grantees, and as a hunter likely to be employed to accompany such an expedition. I place great reliance on the testimony of these witnesses, mainly because it tends to make definite and sure that which otherwise seemed only probable and indefinite. They have not been impeached in the slightest degree, and the general trend of the testimony supports their statement.

*Fifth.* Here my attention is called to what is popularly known as the "Las Animas Grant,"—a grant made December 8, 1843, to Ceran St. Vrain and CORNELIO VIGIL, the latter being the justice of the peace who in the forepart of that year had given juridical possession to Beaubien and Miranda. On January 2, 1844, juridical possession was given by JOSE MIGUEL SANCHEZ, justice of the peace. The section in the juridical certificate reads as follows:

"Commencing on the line north of the lands of Beaubien and Miranda, at one league east of the Animas river, a mound was erected; thence, following in a direct line to the Arkansas river, one league below the junction of the Animas and the Arkansas, a second mound was erected on the banks of said Arkansas river; and following up the Arkansas to one and one-half leagues below the junction of the San Carlos river the third mound was erected; thence, following in a direct line to the south, till it reaches the foot of the first mountain, two leagues west of the Huerfano river, the fourth mound was erected; and, continuing in a direct line to the top of the mountain, to the source of the aforementioned Huerfano, the fifth mound was erected; and, following the summit of the said mountain in an easterly direction, till it intersects the line of the lands of Miranda and Beaubien, the sixth mound was erected; from thence, following the dividing line of the lands of Miranda and Beaubien, in an easterly direction. I came to the first mound which was erected."

This, then, was a grant of land adjacent to and on the north of the Beaubien and Miranda grant. In 1863 the claimants caused a private survey to be made by one Thomas Means, a deputy United States surveyor for the territory of New Mexico. In making this survey the surveyor erected mounds at the corners. It seems from the testimony that, according to the location of these mounds, the south line of this grant was south of the north line of the survey of the grant in controversy. In other words, the north line of the survey and patent was carried too far north. I do not see that this survey and plat of Means challenges the correctness of Elkin's and Marmon's location of the north-east corner of the Beaubien and Miranda grant. Indeed, it rather sustains it; for on the plat the table-land lying east of Raton or Fisher's peak is designated as "*Chicorica Mesa*." The interference is rather on the western part of the north line. The Las Animas river is the significant geographical feature on this part of

the two plats. Its general course is from east to west, with something of a bow to the south.

Means' survey of the Las Animas grant carries its south line entirely south of this river, giving to the grant the whole of the Las Animas valley. Obviously, from the plat, this line was not run on the summit of the Raton mountains, but along the northern border of the highlands north of the mountains. Griffin, in his private survey of the Beaubien and Miranda grant, made the west half of his north line perfectly straight, and thus crossed to the north side of the Animas river at the bow above mentioned, making a portion of the Animas valley a part of the Beaubien and Miranda grant, while Elkins and Marmon, in their survey, ran this line entirely south of the Animas river, leaving out of the grant quite a territory which Griffin had included. It is true, judging from the plats and testimony, they ran this boundary line nearer the Animas river than did Means. The difference in the distance from the river of the two lines I am unable to state positively; but, obviously, there is some conflict between them. Means' survey, therefore, is testimony against the correctness of the survey and patent, so far as this part of the north line is concerned. It must be borne in mind that both the Means and Griffin surveys were private surveys, made at the instance of claimants, and without the sanction of official responsibility; made also a score of years and more after the grants and juridical possession, and by surveyors who had only recently come into the country, and who obviously had no more, if as much, as is now presented, to aid in determining the true lines. Further, the testimony shows that in the first instance the boundaries of neither tract were marked out with any degree of accuracy. All that was attempted to be done was to mark the corners and indicate in a general way the intermediate lines. It cannot now be positively determined which, if either, of these lines is absolutely correct. A question of fact was open to the government, and the determination of the official surveyors, approved by the land department, must be held decisive. If I were to set aside this survey, and order a new one, I do not see from the testimony how or where I could order the new line to run. Under those circumstances the courts must accept the determination of the land department as final and conclusive.

Counsel for defendants have, on a map of Colorado, drawn a rough sketch of the Sangre de Christo, Las Animas, and that portion of the Beaubien and Miranda grant lying in that state. This sketch, while it does not harmonize with the government survey, is certainly curious and suggestive,—suggestive that the intended boundaries of the latter grant may really have extended further north by many miles than have been given by survey and patent.

*Sixthly.* In reference to occupation little need be said. The tract was never inclosed. There were but two or three settlements within its limits. It was a vast, open, unoccupied body of land. So far as

respects the claims of the owners there is testimony that at two or three times Maxwell, who came into the country years after the grant, married the daughter of one of the grantees, and subsequently became owner of the entire tract, claimed that the grant included the Una de Gato body of land above referred to, but did not extend north beyond the summit of the Raton mountains. Also that in 1867 he caused a private survey to be made, and at his instance the surveyors ran the northern line south of the Raton mountains, and erected mounds accordingly. Nothing is preserved of this survey, and it rests mainly on the testimony of one witness. As against this, it may be noticed that in all his claims upon the government, in all the writings produced, Maxwell, while not pretending to state the exact northern boundary, expressed his opinion that upon survey it would be found to extend a few miles into Colorado. This is certainly as satisfactory as any loose and general statements to employes and strangers. Further, Maxwell was not in the country at the time of the grant and juridical possession, and all his information as to extent and boundaries must, of course, have come from others' statements. His residence, after he became interested in the grant, was in the valley of the Rayado, in the southern portion. The northern part being mountainous, was deemed of little value; so that while these facts make against the survey and patent, it cannot be held that they are sufficient to overthrow them; they do not prove the true line. At the best they simply indicate what he then thought was that line. These are the principal lines of investigation and inquiry, and the salient features of the case. As I said before, it needs the maps and plats which are spread before me, and which I cannot incorporate in this opinion, to make clear all the matters and considerations noticed. Summing all the testimony, I conclude this branch of the case by saying that while the absolute correctness of this survey may not have been demonstrated, indeed, in the very nature of the case, the accuracy of every line can never be made certain,—the government has wholly failed to show that it is not correct, and the strong probabilities are that it corresponds as nearly to the limits of the original grant as can ever be ascertained.

So far as the allegations of fraud and the intentional wrong on the part of the surveyors or the claimants, there is not a syllable of testimony worthy of the slightest consideration. The surveyors had no interest in the matter. They followed the instructions of the land department. They acted on the only testimony presented to them, or within their knowledge. They had no dealings with the parties interested in the grant, save as the latter protested against their action in excluding the Una de Gato tract from the survey. If ever there was an official act in which no improper conduct was shown on the part of the officials it is this survey. The same may be said of the conduct of the claimants. It is true, counsel claims that Maxwell caused a false and inaccurate copy of the *desino* to be forwarded from

New Mexico to the department at Washington. The only evidence on this point is a letter of the surveyor general of New Mexico, inclosing what he says is an authenticated copy, and which he forwards at the request of Maxwell. The copy appears to be authenticated. It is not shown who prepared it, or that it was ever seen by Maxwell. The inaccuracies are simply these: The length and width of the grant, as shown in the original and the copy, do not correspond. In the copy the width is reduced about 15 per cent., so that it gives the appearance of a longer and narrower tract than the original. Of course this change alters the angles at the corners a trifle. Further, in the original on the west line are three unnamed hieroglyphic scrawls, which are not copied. What these signify, if anything, no man can tell. Counsel for government think that they are intended to mark the location of three mountain peaks, while counsel for defendants claim that they indicate the sources of three rivers flowing westward. If I were at liberty to indulge in the Yankee habit of guessing, I should guess that counsel for defendants are right. But leaving guesses out, they are absolutely meaningless. Now, it seems trifling to assume that this inaccuracy was intentional, and that it was at the instance of Maxwell, and was with the intent on his part, assisted by the officials in the surveyor general's office, to defraud the government. Certainly a conclusion based upon such assumptions would outrage the first principles of evidence.

Again, the making of the Griffin survey, and the filing of the plat thereof, in the office of the land department, are charged as wrong. The facts in regard to this are as follows: In 1869, many years after the passage of the confirmatory act of congress, Maxwell, the then owner, applied to the surveyor general of New Mexico for an official survey. The law requiring the claimants to pay the expenses of such survey, the surveyor general called upon him to deposit \$5,500, the estimated cost, which was done. Thereupon a contract for the survey was made with W. W. Griffin, a deputy surveyor, and sent to Washington for approval. The secretary of the interior held that the confirmation vested title to only 22 leagues, within the out-boundaries, and the contract was disapproved. Maxwell was endeavoring to sell the property; had given an option bond to Chaffee and others. After the disapproval of the contract the parties interested made a personal contract with the same deputy surveyor for a private survey. This survey was accordingly made, and a plat thereof forwarded to the department at Washington. This survey included the Una de Gato and the Animas valley tract, as heretofore mentioned. Otherwise, it was substantially in accord with the latter official survey. Now, if there was any wrong in this, if it carries evidence of fraud, I am unable to see it. Even if the secretary had been right in holding that the confirmation only vested title to 22 leagues instead of the entire tract, there was certainly room for difference of opinion, and a party cannot be adjudged a wrong-doer who simply asserts the full extent of

the title he believes he has, and resorts to the only means left to him of ascertaining its true limits. I think the course pursued was natural, appropriate, and just. Filing this plat with the department was an open assertion of their claim. Instead of indicating fraud and an intention to deceive, it shows an honest belief in the justness of the claim, and the extent of the grant. The option bonds in which the tract is described, and its area estimated at about 2,000,000 acres, are equally free from any just criticism. True, the estimated area is shown to have been excessive; but all the information possessed was given, and the mistake is not so gross as to indicate an intent to deceive. If it had been twice as large, and known to be excessive, I do not see how the government could have been defrauded. The purchasers would be the only parties who could justly assert any wrong. Now these being the facts upon which fraud and imposition are predicated, is it not just to say that the government has wholly failed to prove its allegations?

More need not be added. I leave the case with the final observation that, after the fullest inquiry and observation by the government, with all the means and facilities at its command, the officials of the government and the claimants of the grant stand without a stain upon the rectitude of their conduct; and the boundaries of the grant, as finally surveyed and patented, if not proved to be absolutely accurate and correct, are at least shown to be as nearly so as any known testimony can determine.

The bill will be dismissed.

---

### NEW CASTLE N. RY. CO. v. SIMPSON.

(Circuit Court, W. D. Pennsylvania. January 2, 1886.)

#### 1. RAILROAD COMPANY—LIEN OF CONTRACTOR.

Where a construction contract for building a railroad was set aside, at the instance of the railroad company, as *ultra vires*, with an allowance of compensation to the contractor for work actually performed by him, *held*, that for the sum so allowed him he was entitled to a contractor's lien under the Pennsylvania statute,—the resolution of January 21, 1843.

#### 2. SAME—PRIORITY OF LIEN.

The contractor's claim is to be preferred to that of adverse counsel for services rendered the company in the litigation with the contractor.

In Equity. *Sur* exceptions to the master's report.

D. B. Kurtz, Marshall Brown, and S. W. Cunningham for exceptants.

R. B. McComb and Frank Whitesell, *contra*.

ACHESON, J. The order of reference to the master, "to ascertain and report to the court the proper and just charges connected with this cause, and amount thereof, which ought to be paid out of the

property of the said company by the receiver," was made on the motion of the receiver's counsel, and (as the court understood the matter) the purpose was simply to determine the charges for which provision should be made before the receiver was discharged, and the property restored to the control of the railroad company, a conclusion to the litigation which then seemed to be in near prospect. Only claims strictly connected with the receivership were then spoken of, and the court did not anticipate that the master would be called upon to pass on other claims, or to determine any question of priority between claimants; and, indeed, save for the interpretation which has been put upon the order of reference, and the action of the master, it would be premature for the court now to consider such question; for, in point of fact, there is no fund for distribution at present under the control of the court, nor is it certain that there ever will be. The only property in the hands of the receiver is an unproductive and unfinished railroad. No decree for its sale has yet been made, and none may ever be made; for, upon the satisfaction by the railroad company of the money decree heretofore made in favor of Thomas P. Simpson, and the payment of its proper share of the costs of suit, and legitimate charges connected with the receivership, the company would be entitled to a restoration of its property.

Now, the very fact that this litigation may be so determined goes far to overthrow the conclusion of the learned master that the claims of the solicitors of the railroad company for their fees are both "part of the costs of this suit," and entitled to priority of lien over the claim of Thomas P. Simpson. Undoubtedly, a chancellor will, out of a fund for distribution, order compensation to the counsel engaged for the value of their services, when the fund, in equity and good conscience, should be subjected to such burden. *Appeal of McKelvy*, 16 Pittsb. Leg. J. (N. S.) 150. Thus, where one of many parties in interest recovers or saves from destruction a trust fund, his reasonable counsel fees will be charged on the fund, upon the ground that it would be inequitable that one alone should bear the burden when others partake of the benefit. *Trustees v. Greenough*, 105 U. S. 527. But is this principle available here to the solicitors of the railroad company, as against Thomas P. Simpson, and to his prejudice? Beyond disputation, their services have been valuable to their own client, and were there a surplus fund here to be disposed of, it might well be that, as against the railroad company itself, the court would order the reasonable fees of its counsel to be paid out of that surplus; and, possibly, in the distribution of such fund, these fees would be preferred to the claims of general creditors; but as against Thomas P. Simpson, I am quite at a loss to see what equity these solicitors have. Their services have in nowise benefited him. The original suit was brought by the railroad company against Simpson to set aside, as *ultra vires*, the construction contract between him and the company, and the prayer for its rescission prevailed. Thus Simpson lost the

profits of his bargain. Then a contest arising as to what was a reasonable compensation for the work of construction he had actually performed, the railroad company succeeded in reducing his claim. Moreover, the appointment of the receiver for the preservation of the property pending this litigation was made at the instance of Simpson, and under the prayers of his cross-bill, despite the opposition of the railroad company. Thus does it appear that from first to last the services of the company's solicitors have been adverse to Simpson, and without the slightest advantage to him. For the work of construction done by Simpson, he claims, and I think rightfully claims, the contractor's lien given by the Pennsylvania statute,—the resolution of January 21, 1843. *Purd.* 118; *Fox v. Seal*, 22 Wall. 424; *Tyrone & C. Ry. Co. v. Jones*, 79 Pa. St. 60. So that, by force of the statute, as well as upon general equitable principles, his right to payment out of the property, which exists by virtue of his services and expenditures, is superior to the claims of adverse counsel for fees subsequently earned in this litigation.

The exceptions which go to the *amount* of the master's allowances to the railroad company's solicitors (and also the special exceptions filed by A. C. Weaver) need not at present be considered; for, unless the railroad should go to sale, and a surplus over Simpson's claim be realized, the court, in the view we have taken, will not be called on to deal with the question of the reasonableness of those allowances, or, indeed, to deal at all with the subject of said fees.

And now, January 2, 1886, so much of the master's report as relates to the receiver's compensation and the fee of his counsel is confirmed; but all the exceptions filed by Thomas P. Simpson to said report, touching the preference given by the master to the claims of the solicitors of the Newcastle Northern Railway Company for fees, are sustained; and all other questions are reserved for further consideration hereafter.

---

### GRISWOLD v. HAZARD and others.

(*Circuit Court, D. Rhode Island.* January 14, 1886.)

#### EQUITY—REFORMATION OF BOND—FRAUD—MISTAKE.

In order to justify the reformation of a bond on the ground of fraud or mutual mistake such fraud or mistake must be most clearly proved. Reformation of bond refused.

#### In Equity.

Heard by COLT and CARPENTER, JJ.

Samuel R. Honey and Arnold Green, for complainant.

Edwin Metcalf and Elias Merwin, for respondents.

CARPENTER, J. This is a bill to cancel or in the alternative to reform a bond given by Thomas C. Durant, as principal, and John N.

A. Griswold and S. Dexter Bradford, as sureties, to the respondents. It appears that at the September term, 1868, of the supreme court of Rhode Island, for the county of Newport, Isaac P. Hazard brought his bill of complaint against Durant and others and the Credit Mobilier of America, in which he alleged that Durant was largely indebted to the Credit Mobilier, and that the corporation had refused to demand and collect the sums due from him, and prayed that Durant be decreed to account with the Credit Mobilier, and to pay over the sums due to that corporation. Rowland G. Hazard was a respondent in that bill, and he and the other respondents in this bill appear to have been interested therein by reason of the fact that they were stockholders in the Credit Mobilier. On motion, a writ of *ne exeat* was issued on that bill, by virtue of which Durant was arrested on the evening of Saturday, the twenty-second day of August, 1868. A discussion then ensued as to the form of bond which might be given as the condition of the release of Durant from arrest, in consequence of which discussion Durant was released on his oral promise to appear at an early hour on Monday morning, the twenty-fourth of August, and execute the required bond. On the day appointed he appeared with his sureties, and executed the bond which is the subject of this suit, and which is a bond in the sum of \$53,735, conditioned "that said Thomas C. Durant shall on his part abide and perform the orders and decrees of the supreme court of the state of Rhode Island in the suit in equity of Isaac P. Hazard and others against said Thomas C. Durant and others, now pending in said court within and for the county of Newport." The evidence shows, without doubt and without contradiction, that this bond was drawn by counsel for Isaac P. Hazard, and was presented to the complainant, and was signed by him as and for the bond which on the Saturday evening before he had agreed to sign. The complainant alleges—*First*, that the bond which was proposed on Saturday, and which he agreed to sign, was a bail-bond, or a bond in the nature of a bail-bond, which would bind him in the penalty only on condition that he failed to produce the body of Durant to answer to such decree as the court should make; and that, when the counsel for Hazard, on Monday morning, presented to him for his signature the bond in question, without explaining to him that it was in effect different from a bail-bond, such presentation amounted to a fraud, from which he should be relieved by the cancellation of the instrument so represented and signed by him. In the *second* place, he alleges that, at the conversation on Saturday, the bond which was then agreed to be signed was agreed and understood by both parties thereto to be a bail-bond, and that the subsequent execution of a bond of a different character was a mutual mistake of fact, from which he should be relieved by reforming the instrument so as to make it conform with the contract actually made between the parties.

We do not think the evidence supports either of these allegations.



At the conversation on Saturday evening, at which the bond was agreed to be given, there were present Mr. Bradley and Mr. Peckham, who were counsel for Isaac P. Hazard; and also Thomas C. Durant; John N. A. Griswold; S. Dexter Bradford; Henry W. Gray, who was a friend of Durant; William D. Lake, the sheriff of the county; and Mr. Van Zandt, who was counsel for Durant. Mr. Bradley and Mr. Peckham both testify in distinct terms that the nature of the bond to be given was fully discussed; that Durant said that he could not give the bond required by the writ, which was a bond not to depart out of the jurisdiction without leave of the court; and also stated that it was impracticable for him to apply to the court to discharge the writ on giving bond as usual in such cases,—giving as the reason for both statements that his business required him to leave Newport on the Monday following; and that they, on behalf of the complainant, then offered to discharge the writ of *ne exeat* by an agreement to be filed in court, provided Durant and his sureties would undertake to execute a bond conditioned that Durant should abide and perform the decrees of the court.

Mr. Peckham testifies:

"The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money, in case Durant should not perform any decree made by the court, was commented on by Mr. Van Zandt and Mr. Durant. During all this interview Judge Bradley did all the talking for the complainants, and Mr. Van Zandt and Mr. Durant spoke about equally for their side. No one else said anything, that I remember with one exception. The sureties were near enough to hear all that was said, and couldn't help hearing, if they paid any attention; but they took no part in the discussion."

Gray testifies, when first called:

"Mr. Griswold was asked to sign the bond, that Durant might be released; and he agreed to do so. \* \* \* The whole idea that I had was that a bail-bond was to be given to replace him within the jurisdiction of the court when wanted, the same as he was when released from jail on Saturday night."

On being recalled in rebuttal, he explicitly denies that there was such conversation as is detailed by Mr. Peckham.

Durant testifies that—

"Griswold signed a bond for my appearance at court, as I understood. \* \* \* The character of the bond was not discussed, to my recollection, but merely spoken of as a bond for my appearance. \* \* \* I supposed myself that that was the extent of the bond."

Griswold testifies:

"I told them, if they would release Durant, I would meet them at Mr. Peckham's office on Monday morning early, and sign a bond for his appearance when wanted. \* \* \* I went to Mr. Peckham's office and signed what I supposed was a bail-bond for Durant's appearance when wanted. \* \* \* I did not understand, nor did any one explain to me, that the bond I was to sign was anything but a bond for Durant's appearance when wanted."

He also explicitly denies the conversation as detailed by Mr. Peckham.

Mr. Van Zandt testifies that it was agreed "that Durant would personally appear on Monday morning and give a bond, as I understood it, to appear and answer to the writ;" that on Monday "a bond, prepared by Messrs. Peckham and Bradley, was handed to me as counsel for Mr. Durant. \* \* \* I told Mr. Durant that, in my opinion, it was a proper bond to secure his appearance in the suit, and the bond was then executed. \* \* \* I myself told Mr. Durant that, in my opinion, the instrument was, in effect, a bail-bond." He also contradicts the testimony of Mr. Peckham and of Mr. Bradley. This is substantially all the testimony bearing directly on the question as to what was said at the conversation on Saturday night.

We cannot find, on this testimony, that there was either fraud or mutual mistake. Where fraud is charged, it must be most clearly proved, and the same rule, with equal reason as it seems to us, has been held to apply to an allegation of mutual mistake. *Hearne v. Marine Insurance Co.*, 20 Wall. 488. In this case the witnesses for the respondents were placed in a position where it was their duty clearly to understand the nature of the security they were to accept, and to see that it was clearly understood by all parties, so that no dispute might arise when the bond came to be executed. They say explicitly that they did so understand, and that they did fully explain the nature of the bond to all who were present; and they detail the substance of the conversation at length, and, in the case of Mr. Peckham, with careful particularity. If their testimony be true, there was no fraud, and there was equally no mistake, unless the complainant made a mistake in relying, as his bill says he did, on his own judgment in signing the bond. We are not prepared to say that their testimony is not true. We think it more likely that the memory of the other witnesses is unreliable.

The bill will therefore be dismissed, with costs.

---

### CHRIST and others v. SCHELL.

(*Circuit Court, S. D. New York.* October term, 1885.)

**TRIAL**—**STRIKING CASE FROM CALENDAR**—**ERRONEOUS ENTRIES BY CLERK.**

Case struck from trial calendar, because the entries of the clerk show that no issue remains for trial.

At Law.

*Almon W. Griswold*, for plaintiff.

*Thomas Greenwood*, Asst. U. S. Atty., for defendant.

**WHEELER, J.** This suit was commenced in the state court, March 4, 1861, was removed to this court, March 20, 1861, and entered in

the clerk's docket of United States Causes, vol. 3, p. 203. A declaration upon the common counts in *assumpsit* and a plea of *non assumpsit* were filed. According to the entries in the cause it was tried, and a verdict was rendered for the plaintiff, February 26, 1862. Judgment was rendered on the report of a referee to ascertain the amount, and the judgment satisfied April 4, 1863. The cause is upon the calendar as a cause pending for trial, and the defendant moves to have it stricken from the calendar because there is no issue remaining in it for trial and it has now been heard upon this motion. The motion is resisted upon the ground that the entries in the clerk's docket do not belong, and were erroneously made, in this case. A suit was commenced by George Christ, Louis Jay, and Julius Hess against the same defendant, October 9, 1864, and was entered in the same docket at page 163. The report of the referee, on which judgment was rendered in this case, appears to have been made in that case. A verdict was entered in that case upon the same day, and a judgment was entered at the same time, and in the same manner, but upon the report of a referee in still another case in favor of the same plaintiffs against the same defendant. There were several other cases in favor of Christ, Jay, and Hess against the same defendants, in all of which there have been verdicts, judgments, and satisfaction except one. The clerk's minutes show verdicts, by consent, in two cases in favor of Christ and others against Schell, without giving the names of the plaintiffs further, February 26, 1862, and a verdict in one such case, May 27, 1864. It sufficiently appears that the verdict entered in this case, February 26, 1862, does not belong in this case. It also sufficiently appears that the verdict of May 27, 1864, does not belong to any other case than this. Nothing appears to have ever been done upon that verdict. The plaintiff Christ, and his various associates, have had as many verdicts as they have had cases, and as many judgments, with satisfaction, as they have had cases, lacking one. The verdict of May 27, 1864, was general, for duties paid on charges and commissions. This suit is said to have been brought, and probably was, although the records do not show, for the recovery of excessive duties on *mouslin de laine*. But the record shows a verdict in this case, with judgment and satisfaction. This is erroneous, but a correction of the error will disclose another verdict which will belong in this case to take the place of the one removed from this case to another. This latter verdict must be set aside before this case can be left with an issue for trial. Whether these corrections should be made after this long lapse of time is not the question now. The case will not stand for trial again until they are made.

Motion granted, and cause to be stricken from the calendar.

INDIANAPOLIS ROLLING-MILL Co. v. St. Louis, F. S. & W. R. Co.<sup>1</sup>

(Circuit Court, D. Kansas. 1886.)

## 1. CONTRACT—RELEASE FROM CONTRACT—AUTHORITY OF OFFICERS.

A by-law of the plaintiff corporation gave the superintendent, with the approval of the president of the company, authority to buy and sell material, and make all contracts for the same, and for work, etc. These officers made a contract for furnishing a large quantity of iron rails to defendant company. After a part performance the purchaser became embarrassed and unable to meet its payments, and in consideration that a third party who had no funds of the debtor, and was under no obligation to make the payment, would pay certain past-due drafts held by the plaintiff against the defendant, the said superintendent and president and treasurer of the plaintiff agreed to, and did, on such payment, release the defendant from said contract, and all damages for a breach thereof. *Held*, that the acts of those officers were within the scope of their authority; that the payment by the third party was sufficient consideration for the release; and that the same was valid and discharged the defendant.

## 2. SAME—EXECUTION OF BOND—BY-LAWS.

Where a by-law provided that the superintendent of the company and all other persons should be subject to the control of the board of directors, in everything where the board *shall elect to exercise such control*, and the board did not elect to interfere with or control the contract for the sale of iron rails to defendant, nor did the board, after full knowledge of all the facts concerning the said release, elect to repudiate the same until several months afterwards, *held*, that the board must be presumed to have waived its right of interference, and consented to the action of its officers.

At Law.

*Wilson, Dunn & Dunn, T. P. Fenlon, and Warner & Dean*, for plaintiff.

*J. H. Richards and Rossington, Smith & Dallas*, for defendant.

FOSTER, J., (*orally*.) There are two principal objections urged by the plaintiff rolling-mill company against the validity of the release that is set up here by the defendant railroad company. The first objection that is urged by the plaintiff company is this: That the release which was executed by Mr. Thomas in New York, as treasurer of the rolling-mill company, was and is absolutely void by reason of the want of authority to execute the same. It appears from the evidence that that release was executed in pursuance of a telegram received by him from Mr. Jones, the president of the rolling-mill company. In the telegram he also recites that two other of the directors of the company concurred with him in consenting to this release; hence this release was made by the consent of Mr. Thomas, the treasurer, Mr. Jones, the president, and two other directors of the company. Now, it is claimed that under the by-laws of this corporation, the rolling-mill company, this release was and is absolutely null and void; and my attention has been called to by-law No. 4, in which it is provided that the superintendent shall have charge of the works, property, and operation of the company, and shall employ all operatives and certify all wages due and their expenditures to the secretary, who shall keep the records thereof, and draw an order on the treasurer for

<sup>1</sup> *Affirmed*. See 7 Sup. Ct. Rep. 542.

the payment thereof; and shall, with the approval of the president, buy and sell material, and make all contracts for the same and for work. He shall report once each month, etc. Now, in this case, Mr. Jones was both president and superintendent. Under this by-law he had the power to buy and sell materials, and to make all contracts for the same, etc. And it appears from by-law No. 6 as follows: "The superintendent, and all other persons, shall, in all cases, be subject to the control of the board of directors in everything where the board shall elect to exercise such control." This original contract between the rolling-mill and the defendant, by which the rolling-mill company sold this large amount of iron, was made by the president of the company, and the board did not choose to exercise any control or management over it. The extensions of the payment of these drafts or acceptances, which were drawn at different times, —the \$85,000 and \$54,000 drafts,—were made by these officers. The board of directors did not choose to exercise any control or management over it. This contract of release, because it is a contract,—and where he has authority, under by-law No. 4, to make all contracts concerning the buying of all material, and so on,—I take it is amply broad enough to permit him to modify any contract made, to change any contract made, and to release any contract made. It would be a very restricted and narrow construction to take any other view of the powers therein conferred and granted.

It is argued here that this is a disposition of the assets of the company. Well, supposing that the rolling-mill company had made a contract that was very disadvantageous to it; that it was losing money by carrying it into force and effect,—then would it be argued that this rule would apply if it was releasing what would be a good contract, but would not apply if it was releasing the company from a contract under which it was bound to lose money? If this authority exists, it must exist as to releasing a contract, whether it be a good or a bad one for the plaintiff company.

Now, this release was made in New York. Mr. Thomas states that he made his report before the board of directors some day in March. It appears from the minutes of the proceedings of the board at that time that no conclusion was arrived at, and no action was taken upon it. One thing is certain upon that record: the board did not elect to exercise the control given them under by-law No. 6 at that time, for they did not repudiate it. The record says they took no action upon it; but Mr. Thomas says the action that really was taken, was in substance this: to take the legal advice of counsel, and act upon that; and not until some two years afterwards does the record of the plaintiff company show a repudiation, in terms, of this release, although suit had been brought in the June following the March of which it was first laid before them. Now, if the board of directors of this company should elect to exercise the control which was given them by by-law No. 6, they must act promptly. They could not play

fast and loose. They cannot say those officers have the power to make a contract, and, if it is good for the company, we won't exercise any control over it, but if they make a contract, and if it is to the disadvantage of the company, we will reserve the right to act upon it, although it may be years afterwards. They cannot do that. If they elected to act upon that release, and repudiate it, they should have acted promptly, and within a reasonable time after full knowledge of all the facts was laid before them. But it appears from the evidence in this case that they did not do it. All that they ever did before this suit was brought was to agree to be governed by the advice of their attorney in the matter; hence I see nothing in the case to sustain the claim that this release was made without authority. It was made by the officers who made the contracts, and this board of directors never did elect to overrule or control the action of these officers, either in making the contract or releasing the contract; hence they acted as the by-laws provided they might act.

The next question is in reference to the matter of sufficient consideration to sustain this release. *First*, we have to look at the facts briefly as to the *status* of the parties at that time. It appears that these acceptances of \$54,000 matured on the seventh day of February, 1883. It is very clearly shown by the evidence in this case that the railroad company, the defendant in this case, had made an error as to when these acceptances really fell due. The error had got into their books through a mistake of the predecessor of Mr. Dowland, the present auditor, and the railroad company was going under the assumption that these acceptances did not fall due until March. That is material in this view of the case. It is evident to my mind that no provision whatever had been made by the railroad company with Moran Bros. to meet these acceptances at the time that they really fell due,—no provision whatever. It appears from the statement of Mr. Moran and the testimony of Mr. Dowland that on February 1st the railroad company were indebted to Moran Bros. for something like \$6,000; that is, not taking into consideration the \$165,000 in bonds which had been sent to Moran Bros. expressly pledged to meet the \$170,000 draft drawn in favor of the Missouri Pacific Railway Company. I say, not taking into account those bonds, and the draft drawn against them for which they stood pledged, the evidence in this case shows that the railroad company was indebted to Moran Bros. over \$6,000. Now, to show that the railroad company were in error as to when these acceptances fell due, I refer to the cross-examination of Mr. Moran, on page 23, in which he reads from a letter which he wrote to Mr. Chenault on the fifth of February. After urging upon him the necessity of obtaining this release from the Indianapolis Rolling-mill Company of the old railroad company contract as a consideration, he says: "Of the payment of the drafts which mature on the *fourth of March* next, so as to prevent any difficulty or litigation thereafter." At that time it appears from this letter that he wrote

to Mr. Chenault that he was under the impression that these acceptances did not mature until March, and he wrote that letter on the fifth day of February; so it is not at all likely that it was manufactured for the purpose, because at that time there seems to have been no trouble or contest. Then he quotes in his cross-examination from a letter from Mr. Chenault. It reads as follows:

"Thomas is correct. The books as turned over to us show date to be the seventh of March, but investigation through Mr. Tiernan shows it to be February. This error takes us by surprise. The notes must not go to protest, but we must have a few days to consult with Hayes and others before answering you as to what is to be done. Please assist us to get Thomas to wait, or advise us what to do.

[Signed]

"WILLIAM CHÉNAULT, Treasurer.

"J. H. DOWLAND, Auditor."

Now they refer to consulting with Hayes. That has another important bearing in this case. Why consult with Hayes? It goes to corroborate the testimony of Mr. Moran and Mr. Dowland that the \$165,000 bonds were absolutely pledged for the payment of the draft, and Mr. Hayes was one of the chief officers of that company. They wanted time to consult with him to see, as they testify, if they could not get him to release his claim upon this amount so that this draft might be met. In another place he says: "On the tenth of February we received a telegram dated the ninth of February from Mr. Chenault, as follows: 'I agree with you in the matter of canceling rolling-mill contracts.'" Now that was received on the 10th and dated on the 9th, and that was after the release had been made. "I go to St. Louis to see what we can get Hayes to do. In the mean while, what do you think of probability of borrowing enough money to pay this all off?" These are extracts from a telegram sent by Chenault and Dowland to Moran, dated eighth February, in which also appear these words: "Hayes is on his way back to St. Louis, where our president and treasurer will meet him. Meanwhile, he requests us to ask you to assist in having the rolling-mill drafts extended. At any rate, please put them off until our parties telegraph you from St. Louis. Answer about getting extension."

This evidence convinces me beyond any manner of doubt that this \$165,000 was absolutely pledged for the payment of that Missouri Pacific draft of \$170,000. All the correspondence between the parties, the telegrams, letters, the statement that they were taken by surprise, go to show that they supposed that they had to make no provision for the meeting of these \$54,000 drafts until March. Hence, although Moran Bros. were in one sense the financial agents of the railroad company, it is very clear that no provision had been made for meeting this \$54,000, and it is equally clear to my mind that they had no funds of the railroad company in their hands at that time applicable to the payment of those particular drafts. The fact that they were the agents to sell their bonds did not impose any obligation upon Moran Bros. to take up these drafts and acceptances, unless they had

funds to do it with; and Moran, as Mr. Thomas says himself, said: "We haven't got a dollar of their funds in our hands." So the rolling-mill company, or its officers, was informed of just the *status* of affairs; and the testimony in this case satisfies me that that was in reality the fact.

So I conclude in this case, from the facts, that no legal liability rested upon Moran Bros. to pay the acceptances of the railroad company. The company had made no provision for meeting them at the time they fell due. That Moran's paying these acceptances under the circumstances was a sufficient consideration to sustain the release which was given in consideration of their paying the acceptances, and even if they were acting as the absolute agents of the railroad company, I am not prepared to say that in such a case there would not be a sufficient consideration to support the release. It appears that the railroad company at that time was absolutely insolvent; that it had an indebtedness of over \$600,000, with between two and three hundred thousand dollars of assets. With the probabilities existing at that time of litigation to collect these drafts against the company, and from these facts, that the holders of these drafts were pressing the rolling-mill company, and these gentlemen who indorsed them were threatened with litigation, I am not prepared to say but under the authorities, even if Moran Bros. were acting as their agents in this transaction, that, under the circumstances, there would have been a sufficient consideration to support this release, if Mr. Thomas was fairly placed in possession of all the facts.

There has been considerable said here about a statement made in a letter after this transaction had been closed, in which Moran speaks of there being a balance there of about \$7,000 due the defendant. Of course he is speaking of the date from which he wrote that letter, and it is true, while he had made this statement on the eighth day of February, and had taken the responsibility of using, so to speak, a part of the security pledged to the Missouri Pacific, not hearing from Mr. Hayes in the mean time, that he did, in fact, then charge up to the rolling-mill company the payment of those drafts as of the 7th; and then he goes on to make a statement of an account; but the statement of that account very clearly, as the testimony shows, dates as a matter of fact subsequent to the eighth day of February, although it was entered as of a date prior to that time. In his letter to Chennault, of February 8th, he says:

"As Captain Hayes is absent, we determined to pay the fifty-four thousand dollar drafts of the Indianapolis Rolling-Mill Co., having obtained from that company a discharge of all claims against the railroad company for non-fulfillment of contract to purchase rails. We consider this an important thing, as they said they had lost \$50,000 by non-fulfillment of the old contract, and felt sore because the railroad made no further purchases from them."

That goes to show that Hayes had not been reached to get his consent, and Moran had taken this responsibility himself. Hence I say



that, under this statement of facts, there was a consideration, in my opinion, sufficient to sustain that release. Moran Bros. did not misrepresent, as I can find from the testimony, any material facts to Mr. Thomas or the officers of the rolling-mill company as to their relations with the railroad company; and it further appears from the contract which was dated in December that they were not absolutely bound even to make advances upon these bonds. It was within their election. They might have said, under the contract: "We haven't a dollar that can be applied to these drafts, or the payment of the drafts, of the Missouri Pacific Company. We will not recognize our liability until we actually sell the bonds." That seems to have been their right under the contract, if they had chosen to take that position; so that, in any view of the case, I can find no legal obligation on these parties to pay those drafts; therefore that release, in my opinion, is a valid release, and it is decisive of this action.

Judgment will go for the defendant.

---

*In re VETTERLEIN and others, Bankrupts.*

(*District Court, S. D. New York. January 21, 1886.*)

**BANKRUPTCY—TRUST FUND—LIEN, WHEN LOST—IDENTIFICATION.**

V. & Co., in 1864, more than six years before their failure, received certain moneys collected from an insolvent debtor, on behalf of themselves and various other creditors, acting jointly. It was so credited on their books, and their own share and expenses deducted. No attempt was made to trace this fund specifically into the hands of the assignee in bankruptcy and the circumstances leave no doubt that it was converted by V. & Co. and used in their general business before their failure. *Held*, that no specific lien existed, in favor of the rightful distributees of the fund, in 1864, upon the funds now remaining in the hands of the assignee in bankruptcy.

**In Bankruptcy.**

*Roger M. Sherman*, for petitioners.

*Jas. K. Hill*, for assignee.

*Geo. E. P. Howard*, for the United States.

BROWN, J. The petitioners ask that the sum of about \$3,000, in the hands of the assignee in bankruptcy, remaining on deposit subject to the order of the court, should be applied to pay their claim, on the ground that they had a specific lien upon the fund. Several years before the bankruptcy of Vetterlein & Co., various creditors, including Vetterlein & Co., who had claims against one Solomon, joined together in the endeavor to recover their respective demands. Upwards of \$7,200 was recovered, which was received by Vetterlein & Co. for the benefit of all interested. Upon their firm books Vetterlein & Co., in 1864, entered the transaction, "Solomon's estate, in account with Vetterlein & Co.," crediting the same with the cash collected, and deb-

iting the account with their own share in the proceeds, with the amounts paid to certain other creditors, and with the expenses of collection. On the first of January, 1868, the credit balance of this account was stated upon their books to amount to \$3,014.68. In 1870, Vetterlein & Co. failed, and made a voluntary assignment, under which all their assets then available were collected by the voluntary assignee. Upon proceedings in bankruptcy against the firm, an assignee was appointed, who succeeded in setting aside the voluntary assignment, and in recovering the proceeds of the assets of the firm. The balance now in the assignee's hands is what remains after some dividends, and after payments made to the United States as a preferred creditor.

If a legal lien upon the moneys now remaining exists in favor of the petitioners on account of the deposit of the proceeds of Solomon's estate in 1864, the priority of the United States would be superseded. I have attentively considered the arguments and authorities cited by counsel for the petitioners, and cannot sustain the alleged claim of lien as valid. No attempt has been made to identify the present fund as the remains of the specific deposit in 1864, or to connect this sum with the deposit then made in any other way than by the general benefit to Vetterlein & Co.'s estate through their receipt of the moneys in 1864. So long as that deposit could be identified or specifically traced no doubt a lien upon it would be upheld. But there is no evidence and no probability that any of this deposit specifically came to the hands of the voluntary assignee some six years after that fund was received by the firm; and the assignee in bankruptcy certainly received nothing directly from this specific deposit. No lien could be sustained, therefore, unless the entire *corpus* of the partnership estate could be held legally subject to a lien on account of moneys that had been received years before, impressed with a trust, although the fund had been converted and used in the general business of the firm, and was no longer capable of identification. There is no authority, to my knowledge, that sustains a lien, to such an extent, against the estate of a depository. It would be incompatible with the well-settled rights of general creditors in numerous familiar cases that are constantly arising out of the transactions of commission houses that do business both on their own account and for consignors. See *Hoyt v. Sprague*, 103 U. S. 613, 624, 629.

Without considering the other objections, the motion must be denied.

## BIRDSEYE and others v. HEILNER and others.

(Circuit Court, S. D. New York. December 22, 1885.)

## PATENTS FOR INVENTIONS—INFRINGEMENT—DEFECTIVE PLEADINGS—PRACTICE.

By taking issue upon a plea the complainants admitted its sufficiency; and the defendants, having established the truth of the facts alleged in their plea, are entitled to a judgment.

## In Equity.

*Edmund Wetmore*, for complainants.

*Livingston Gifford*, for defendants.

WALLACE, J. By taking issue upon the plea the complainants admit its sufficiency in point of form and substance. The only facts which are put in issue by the replication are whether the springs or stays which the defendants have employed in making corsets were purchased by them from one Bassett, and whether Bassett was licensed by complainants to manufacture and sell said stays or springs for use in the manufacture of corsets. If these allegations of fact are established, the legal conclusion that they are a good defense to the suit is not open to contention. The case has been argued as though the question were whether the complainants have authorized Bassett to license others to use the complainants' patents for improvements in corsets. No such issue is raised by the plea and replication.

The proofs show that the defendants purchased the springs or stays used by them in manufacturing corsets, and which are known in the trade as "twin-wire," from Blun & Company and one Doremus, who had purchased them from Bassett, and who were his agents to sell the same to others. The only question, therefore, is whether Bassett was authorized by the complainants to sell the articles for use in the manufacture of corsets. The complainants and Bassett entered into an agreement bearing date March 30, 1881, by which Bassett covenanted to manufacture for the complainants all corset materials which they might require upon specified conditions, including bone-wire, twin-wire, and other corset materials, and the complainants covenanted to discontinue the manufacture of such materials. The agreement contained these provisions:

"It is agreed that the parties of the second part [the complainants] shall not sell bone or twin wire to any other corset manufacturer except when it is intended to be used in corsets intended for the sales of the parties of the second part. It is agreed that the party of the first part [Bassett] shall not sell twin-wire to any party or parties for a less price than twenty per cent. in addition to the price which he shall charge the parties of the second part, and he shall pay to the parties of the second part five per cent. on all sales of twin-wire which he may make to any party or parties other than the parties of the second part."

It appears very clearly by the proofs that the complainants had been making for several months the article of twin-wire for use in

corsets of a description invented by one Bray. It is the precise article, also, that has been purchased by the defendant of Bassett through Blun & Co. and Dôremus. As early as in the fall of 1880 the complainants had entered into an arrangement with Bray for the purchase of his invention, which had not then been patented, and Bray had agreed to assign his patent to them when it should be obtained. Owing to delay on the part of Bray, the application for a patent was not filed until April 23, 1881. In the mean time the complainants had been making twin-wire to use in manufacturing the Bray corsets, and had been manufacturing these corsets and selling them to a limited extent. The time came when the complainants wanted to forego the manufacturing of corset material and confine themselves to manufacturing corsets from materials to be supplied by others, hence the negotiations with Bassett which resulted in the execution of the agreement. Bassett was aware of the relations existing between the complainants and Bray, and that the complainants had purchased Bray's invention and expected to obtain the patent; and these matters had been the subject of conversation between Bassett and complainants during the negotiations which resulted in the execution of the agreement. It also appears that although at some period previous to the date of the agreement twin-wire had been used to a limited extent for other purposes than for the manufacture of the Bray corsets, its use for those purposes had become obsolete and had been abandoned. In view of these facts, it is manifest that both parties to the agreement understood that the twin-wire which Bassett was to make and sell to the complainants and to other persons was just such an article as he has sold to the defendants. It is also manifest that the parties contemplated that the sales which Bassett was expected to make would be made to manufacturers for use in making corsets. This was the only use of which the article was practically capable, and unless it was to be sold for such use it could not probably be sold at all.

If the question were whether by this agreement the complainants have authorized Bassett to license others to use their patents in manufacturing corsets, the answer would not seem to be difficult. The scope of the agreement does not extend beyond the relations which the parties to it are to assume towards each other in the manufacture and sale of corset material. There is nothing in its language, or in the circumstances contemporaneous with its execution, to justify the implication that Bassett was to have any interest by way of license or otherwise in either of the two patents upon which the bill is founded. The contemporaneous facts and the terms of the agreement are consistent with the purpose of the parties to secure to the complainants a royalty upon twin-wire in the event a demand for it should arise among manufacturers to be licensed by the complainants to use their Bray patent, who might find it more convenient or economical to purchase the material of Bassett than to make it themselves. This con-

clusion is enforced by the fact that the complainants did not then have any interest in the other of the two patents in suit,—the patent granted to Cohn in February, 1880, and which was purchased by the complainants in October, 1884. But, as has been stated, this question is not here. The defendants have established the truth of the facts alleged in their plea, and they are therefore entitled to judgment.

---

BOGART v. HINDS.<sup>1</sup>

(Circuit Court, S. D. New York. December 29, 1885.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM.

The first claim of letters patent No. 119,561, to Abraham L. Bogart, October 3, 1871, for "an insulated gas-burner, having its insulated section of or from glass, or similar vitreous material, substantially as and for the purpose specified," cannot be construed, in view of the state of the art, as a broad claim for a gas-burner in an electric lighting system having an insulated section of the material mentioned.

2. SAME.

But this claim should not be limited to an insulated burner having all the details of construction described in the specification, as such a construction of the claim, in view of the prior state of the art, would unduly narrow the scope of the real invention of the patentee.

3. SAME.

The essential novelty of the patentee's invention consists in selecting an appropriate insulating material, and making from it the upper part of a gas-burner which will serve both to support and insulate the electrical conductor, and as a gas-way from the gas-pipe to the place where the spark is communicated to the gas.

4. SAME.

The claim, as construed, valid, although an entire gas-burner made of substantially the same material, but with no thought of its utility for insulating purposes in an electric lighting system, was old, and although other inventors had inserted insulating material in electric lighting burners, employing independent insulators and independent insulated sections.

5. SAME—INVENTION.

In view of the comparatively unsuccessful efforts of those who preceded patentee, and of the manifest improvement which resulted from the changes made by him, *held*, that what he did involved invention.

In Equity.

*Walter D. Edmonds*, for complainant.

*Van Santwood & Huff*, for defendant.

WALLACE, J. Infringement is alleged of the first claim of letters patent No. 119,561, granted to Abram L. Bogart, October 3, 1871, for an improvement in apparatus for lighting gas-jets by induced currents of electricity. The claim is: "(1) An insulated gas-burner, having its insulated section of or from glass or similar vitreous material, substantially as and for the purpose specified." This claim cannot be construed as a broad claim for a gas-burner in an electric

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

lighting system having an insulated section of the material mentioned. The patentee was not the first to discover the peculiar value of such material for insulating purposes in gas-burners intended for use in electric gas-lighting apparatus, and the novelty of the claim would be negatived by the patent to Bean and Mumler, of June 4, 1867, and the patent to Barbarin, of June 1, 1869. On the other hand, upon correct principles of construction, the claim should not be limited to an insulated burner having all the details of construction which are described in the specification of the patent. The second claim of the patent makes various details of construction constituents of the claim. Clearly, these details are not to be incorporated into the comprehensive language of the first claim. Such a construction, in view of the prior state of the art, would also unduly narrow the scope of the real invention of the patentee.

The essential novelty of the patentee's invention consists in selecting an appropriate insulating material, and making from it the upper part of a gas-burner which will serve both to support and insulate the electrical conductors, and as a gas-way from the gas-pipe to the place where the spark is communicated to the gas. The patent to Arnold and Irving, of March 12, 1867, shows an entire gas-burner made of substantially the same material as that employed by the patentees. This gas-burner, however, was made with no thought of its utility for insulating purposes in an electric lighting system. It was an ordinary gas-burner. Other inventors had inserted insulating material in electric lighting burners, employing independent insulators and independent insulated sections. By substituting a burner similar to that of Arnold and Irving, and making a slight modification in its exterior construction, so as to form a shoulder upon which the electrical conductors could be firmly and securely fastened, the patentee was enabled to dispense with the complicated parts employed by those who preceded him, and made a simple, compact, and efficient burner, which would serve both as an insulator for the conductors, a gas-way from the metal pipe to the point of ignition, and a firm support for the conductors. It is quite apparent that in strength, rigidity, and simplicity of construction it is a much better practical burner than those which were devised by preceding inventors who were striving to make an efficient burner. In view of the comparatively unsuccessful efforts of those who preceded him, and of the manifest improvement which resulted from the change, it is not doubted that what he did involved invention.

The language of the claim does not necessarily limit the patentee to a narrower invention than he really made, and, by selecting the essential features of his improvement as described in the specification, and discarding non-essentials, it can be read so as to secure him to the extent of his invention, in the light of pre-existing patents and the prior state of the art.

The defendant has appropriated this invention. He has changed the mode of fastening the conductors to the burner, but they rest upon a shoulder of the insulated part of the burner, which serves as a gas-way from the gas-pipe to the point of ignition. The complainant is entitled to a decree.

PIPER v. SHEDD and others.<sup>1</sup>

(Circuit Court, N. D. Illinois. November 9, 1885.)

1. PATENTS FOR INVENTIONS—MACHINES FOR MOWING UNDER WATER.

Letters patent No. 154,900, of September 8, 1874, to Thomas Piper, for improvement in floating mowing-machines, are valid; but the claims are narrow, and cover the combination of elements shown, or known equivalents therefor.

2. SAME—EQUIVALENTS—INFRINGEMENT.

The patent described and claimed the combination, with a boat, of the ordinary cutting device of a mowing-machine, whereby grass and weeds could be cut below the surface of the water; the reciprocation of the sickle being effected through a vertical, vibrating lever, pivoted near its center, and connected at one end to the sickle, and at the other to machinery on the boat. Defendants employed the same devices, except that they communicated motion to their sickle by means of a vertical, revolving shaft, having a short crank connected to the sickle. *Held* that, as this shaft and crank performed the same function as complainant's lever, and no other, and was a known equivalent, the charge of infringement was fully sustained.

3. SAME—PIPER'S INVENTION STATED.

The problem solved by the patentee was the adapting of the ordinary cutting apparatus of a mowing-machine to the use of cutting weeds and grass under water, by suspending such cutting apparatus from a boat, and imparting motion to the cutter from machinery on the boat; and its solution required more than mechanical skill.

4. SAME—ANTICIPATION.

This patent not anticipated by devices for dragging scythe-blades under water at the stern of a boat; by a device for cutting weeds along-side of a railroad track, consisting of the cutting apparatus of an ordinary mowing-machine extended from the side of a car or truck; nor by pile-cutters having circular or reciprocating saws, working under water from motion imparted to them by machinery above the water through shafts or levers.

In Equity.

*Coburn & Thacher*, for complainant.

*Munday, Evarts & Adcock* and *W. B. Gibbs*, for defendants.

BLODGETT, J. By this bill the defendants are charged with infringement of a patent granted to the complainant on September 8, 1874, for an "improvement in floating mowing-machines." The patentee in his specifications describes the scope and purpose of his machine as follows:

"This invention relates to a mowing-machine for cutting water plants, and clearing weeds and grass from the water; useful for clearing the water for

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

ice-making purposes, and for freeing ornamental lakes and bodies of water in parks of unsightly weeds. The machine is chiefly intended to be used for clearing the water of weeds for the purpose of making ice."

The leading feature and characteristic of the device consists in suspending the common cutting apparatus of a mowing machine from the side of a boat, to such a depth below the surface of the water as shall be necessary, and actuating this cutting apparatus by means of machinery placed upon the boat, so that, as the boat progresses through the water, the sickle cuts the grass and weeds substantially in the same manner that the grass is cut by the ordinary mowing-machine. By means of two dependent standards, P, P, the cutting device is suspended in the water, and the depth which these standards shall reach in the water is regulated by a pivot at the point where the frame of the machine is fastened to the boat. A vertical lever, J, pivoted at or near its center, reaches to the sickle, and is connected therewith, and a reciprocating motion being given to this lever by machinery on the boat, the same motion is transmitted to the sickle. The claims are:

"(1) The sickle, L, sickle-bar, M, lever, J, the dependent standards, P, P, and the boat, A, combined and operating as specified. (2) The frame-work, B, pivoted at *b* to the boat, A, the dependent standards, P, P, and sickle-bar, M, combined as specified, for raising and lowering the sickle."

The defenses set up are non-infringement, and that the patent is void for want of novelty.

The machine used by the defendants shows the same cutting apparatus as that used by the complainant; that is, both have adopted this same old and well-known sickle-bar and reciprocating sickle used in mowing-machines; but the defendants, instead of communicating motion to their sickle by a vibrating lever like that shown in the defendants' machine, use a vertical revolving shaft with a short crank upon the lower end, and this crank being connected with the sickle, gives it the desired vibratory motion.

The complainant does not claim to have invented the sickle or cutting apparatus, but only claims to have arranged and adapted it to cut weeds and grass under water, and this he does by combining the old cutting device of a mowing-machine with a boat to float upon the water, and transmitting motion to the cutter by means of his vibrating lever, J. The defendants have substituted their vertical crank-shaft, for the complainant's lever, J. This shaft performs the same function as the complainant's lever, and no other, and is a known equivalent for the lever; so it seems to me the difference is only colorable, and I am of opinion that the charge of infringement is fully sustained.

In support of the allegation of want of novelty defendants have put in evidence several old patents for sawing off piles under water; the patent of J. Hinds, of September 5, 1840, and the patent of Peter J. Stone, of August 2, 1870, for cutting grass under water; and the pat-



ent to J. S. Boicourt, of December 17, 1867, for cutting weeds along-side of railroad tracks. The Hinds and Stone patents show devices for dragging common scythe-blades under water at the stern of a boat, while the Boicourt patent is an adaptation of the ordinary mowing-machine to the work of cutting grass or weeds along-side of a railroad track by means of a sickle-bar extending from the side of a car or truck. The pile-cutting machine shows circular or reciprocating saws working under water from motion imparted to them by machinery above the water through shafts or levers. The problem which the complainant seems to have solved by his device was to adapt the ordinary cutting apparatus of a mowing-machine to the use of cutting weeds and grass under water, where the water or mud was too deep to allow of the use of the ordinary farm mower, by suspending the cutter in the water from the deck of a boat, and imparting motion to the cutter from machinery on the boat. No new thing was invented to do this work, but a combination of old elements was made which produced the desired result.

The patent is narrow, and covers the combination of elements shown, or known equivalents therefor. It does not seem to me that the older devices shown in the proof anticipated this combination, or that the complainant's device can be said to be a new use of an old machine. It seems to me to have required more than mechanical skill to combine a mowing-machine with a boat in such a way as to make it operate successfully for mowing under water.

The defendants are therefore found to infringe, as charged by the bill, and a reference to a master to compute damages will be made.

---

### SCOTT MANUF'G Co. v. SAYRE.<sup>1</sup>

(*Circuit Court, D. New Jersey.* August 31, 1885.)

#### 1. PATENTS FOR INVENTIONS—PATENTABLE COMBINATION.

A patentable combination is not necessarily affected by the fact that all the elements forming it are old, if by their co-action a new and useful result follows; but there must be a co-action among them, to take the case out of the category of a mere assemblage or aggregation of parts.

#### 2. SAME—INVENTION—MECHANICAL SKILL.

Merely assembling old parts together, or placing them in juxtaposition, does not indicate invention. Some new or peculiar function, produced by such a combination, must be developed; and unless this follows, the new arrangement is the mere exhibition of mechanical skill.

#### 3. SAME—AGGREGATION NOT INVENTION.

An assemblage of old parts, each of which performs the same function that it has performed in other old combinations, does not form the subject of a valid claim.

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

## 4. SAME—PARTICULAR PATENT.

The first and third claims of letters patent No. 192,057, of June 19, 1877, to Charles P. Dewey and Robert P. Scott, for improvement in ice-creepers, do not cover patentable combinations.

**In Equity.**

*G. H. Howard*, for complainant.

*A. Q. Keasbey & Sons*, for defendant.

NIXON, J. This suit is brought on letters patent No. 192,057, dated June 19, 1877, and issued to Charles P. Dewey and Robert P. Scott, for "improvement in ice-creepers." The complainant alleges the infringement of the first and third claims of the patent, both of which are combination claims. The elements of the combination of the first are a calk-plate, a rod or spindle, and adjustable jaws. The third claim has the same elements, to which is to be added a locking device, consisting of a spiral spring on the rod or bolt, to hold the calk-plate in position. I have no doubt that the mechanism of the ice-creeper of the defendant infringes the patent of the complainant. There are some minor differences, but the constituents and the mode of operation of the two are substantially the same. Both are fastened to the heel of the shoe by a screw-clamp. Both have the reversible calks, which, when adjusted for use, extend to a greater or less extent over the area of the under side of the heel, and, when in their inoperative position, are turned or folded under the instep of the shoe. In each, the calks move upon a rod, extending across the shoe; the rod being provided with a thread and thumb, and having clamps, one fixed and the other free upon the rod, the wheels being rendered efficient by a locking device, which is a spring surrounding the rod.

The real question in the case, and the one principally noticed at the final hearing, is whether the combinations of the patent are, in fact, patentable. There seems to be a growing sentiment among inventors that the supreme court, in its more recent decisions, has become, I will not say more exacting, but less liberal, in its construction of patents for a combination. Such cases as *Pennsylvania R. Co. v. Locomotive Co.*, 110 U. S. 491; S. C. 4 Sup. Ct. Rep. 220; *Phillips v. Detroit*, 111 U. S. 604; S. C. 4 Sup. Ct. Rep. 580; *Tack Co. v. Two Rivers Manuf'g Co.*, 109 U. S. 117; S. C. 3 Sup. Ct. Rep. 105; *Hollister v. Benedict & B. Co.*, 113 U. S. 59; S. C. 5 Sup. Ct. Rep. 717; and *Thompson v. Boisselier*, 114 U. S. 1; S. C. 5 Sup. Ct. Rep. 1042,—are quoted in support of this view. Whether true or not, it is my duty to examine the present claims in the light of these decisions, and to give them such interpretation and effect as the deliberate judgment of that court declares they are entitled to.

Speaking generally, a person, to obtain a valid patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof. Section 4886, Rev. St. It is not easy to obtain a satis-

factory definition of a patent for a combination. It is not necessarily affected by the fact that all the elements forming it are old. They may be old, and yet may be so arranged in combination that by their co-action a new and useful result may follow. But there must be a co-action among them, to take the case out of the category of a mere assemblage or aggregation of parts. In *Reckendorfer v. Faber*, 92 U. S. 347, the supreme court said:

"The combination, to be patentable, must produce a different force, effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result by their union; if not so, it is only an aggregation of separate elements."

In the later case of *Pickering v. McCullough*, 104 U. S. 310, they took a step in advance, and held "that, in a patentable combination of old elements, all the constituents must so enter into it as that each qualifies the other. \* \* \* It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operative action of all the elements, and which is not the mere adding together of separate contributions; otherwise, it is only a mechanical juxtaposition, and not a vital union.

Merwin, in his valuable work on the Patentability of Inventions, in commenting on this last case, (page 401,) remarks that "it may be gathered from this that, in a patentable combination, there must be a new interaction of some sort between the several elements. \* \* \* It is not sufficient that one element is ineffective without the others,—that its function is useless, except in combination with other functions; but the function of one must be modified in some way by the the function of another, so that the function of one element is not the same in the combination that it was in the place where it was taken; a peculiar function must be developed in the combination. This need not be true of every element in the combination; but it must be true of some one element, or of several elements, and the virtue of the combination must inhere in this peculiarity of function developed by it."

I fear that the complainant's patent cannot stand this test. It is clear that all the elements are old. The records of the patent-office furnish a large number of patents for ice-creepers of every style and variety. The state of the art shows that the patentee, by searching among these, could have selected all the constituents of his combination. Without stopping to designate the particular patent from which the separate part or element is taken, I think he could have found everything embodied in his alleged invention, or its mechanical equivalent, in the patent of Morrison in 1858, of Krauser in 1863, of White in 1867, of Greene in 1865, of Richardson and Morse in 1866, of Farley in 1868, of Turner in 1871, of Earle in 1873, of Cone and Furniss in 1876, and in the defendant's Exhibit No. 19, which reveals the mechanism of ice-creepers sold in Cincinnati in the open market as early as 1869.

As before stated, a patent for a combination is not invalid because all the parts are old. But merely assembling them together, or placing them in juxtaposition, does not indicate invention. Some new or peculiar function, produced by such a combination, must be developed. Unless this follows, the new arrangement is the mere exhibition of mechanical skill.

It appears to me that the difficulty about the complainant's patent as a combination is that none of the parts shown in the construction perform any different function than they had performed in other patents or combinations.

For this reason, I am constrained to hold that upon the evidence and the law the case is with the defendants.

The bill must be dismissed.

---

WILSON v. CUBLEY and others.<sup>1</sup>

(Circuit Court, N. D. Illinois. January 4, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.

The first claim of letters patent No. 255,229, of March 21, 1882, to Charles C. Wilson, for improvement in hand-stamps, held valid and infringed.

2. SAME—FEATURE SHOWN BUT NOT CLAIMED IN PATENTEE'S EARLIER PATENT.

The fact that the complainant showed a feature in an earlier patent did not of itself preclude him from claiming it in a subsequent patent, under the rule in *Graham v. McCormick*, 11 Fed. Rep. 859, and cases there cited.

3. SAME—ADDITIONAL FUNCTION PERFORMED BY INFRINGING DEVICE.

The fact that defendants' device is an improvement, and, as such, patentable, does not entitle him to use the patented device without license

In Equity.

*Peirce & Fisher*, for complainant.

*H. Henderson*, for defendants.

BLODGETT, J. This is a bill for an injunction and accounting, by reason of an alleged infringement of letters patent No. 255,229, issued to complainant, March 21, 1882, for "an improvement in hand-stamps." The first claim of the patent only is claimed to be infringed.

The elements of this claim are shown in Figs. 6 and 7 of the drawings of the patent, and are one modification of the invention covered by the patent. The claim reads as follows: "In a hand-stamp, the plate, F, having a receiving slot and catch-lug in combination with the type, and detachable spring-catches for engaging said lug, substantially as shown and described."

The defendants make and sell a hand-stamp in which they use a plate like complainant's plate, F, with a receiving slot for the type and lugs, with detachable springs for holding the type in place by

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

engaging the spring with the lugs. Complainant's patent shows the type arranged upon a band around a shell or cylinder, and by moving this band the desired type are brought to the lower part of the shell, where they are passed into the slot in the plate, F, and kept there by means of the catch-spring and lugs. Defendants set their type into a metal box or frame, and insert the box in the slot, and retain it in place by means of a catch-spring and lugs. It is true, as contended by defendants, that their screw-lugs may have an additional function not shown in the complainant's patent; that is, the element of adjustability, by which the lugs can be shortened or screwed down, as the face of the type wears away, so as to keep the type in the slot even with the rest of the type in the stamp; but there can be, I think, no doubt that the defendants' lugs and spring perform the same function in the defendants' stamp that is performed by the lugs and springs in complainant's patent, and the fact that they put their type into a metal box or frame, and set this box or frame into the slot, in no way changes the operation of their machine from that of the complainant.

The evidence of prior use, and as to the prior state of the art, does not, it seems to me, defeat the complainant's patent, for want of novelty, or so limit it as to allow the defendants to use these parts in their combination. The fact that the complainant showed a feature analogous to the function and operation of this feature in one of his earlier patents did not, I think, preclude him from taking this patent, under the rule laid down in *Graham v. McCormick*, 11 Fed. Rep. 859, and the cases there referred to.

The adjustable screw-lugs used by the defendants may be an improvement on the fixed and rigid lugs shown by the patent, and for that reason might form the subject of a further patent; but that is no reason why the defendant should use them without license from the plaintiff.

The finding, therefore, is that the defendants infringe the first claim of the complainant's patent, and there should be a reference for the purpose of taking an account.

THE CITY OF SPRINGFIELD.<sup>1</sup>

THE EDNA B. KING.

STUDWELL v. THE CITY OF SPRINGFIELD and another.

(District Court, S. D. New York. January 21, 1886.)

## 1. COLLISION—VESSELS MEETING IN NARROW CHANNEL—RIGHT OF WAY.

The rule that a vessel going with the tide through a narrow, dangerous channel has the right of way, and that a boat going in the opposite direction is bound to wait until the descending vessel has come through, cannot be justly applied when the descending boat has other channels available on the right hand side.

## 2. SAME—HELL GATE—SEVERAL CHANNELS—KEEPING TO THE RIGHT.

Vessels on the ebb-tide, bound down through Hell Gate, where three channels are available, should not take the east channel, if they have notice that a boat is coming up; and vessels going up on the right, through the east channel, have the right to assume that descending steamers, in the absence of any contrary indication, will keep to their own right, and pass through one of the other two channels, and not attempt the east channel to the left.

## 3. SAME—BEND IN RIVER—SEVERAL CHANNELS—LONG WHISTLE—INSPECTORS' RULE 5.

A long whistle, given in accordance with the inspectors' rule 5, "on approaching a bend in the river," is no intimation, where there are three equally available channels around the bend, that the vessel giving it intends to take the channel to her own left, and such a whistle from a vessel, after passing Negro point with the ebb-tide, is not in practice so understood.

## 4. SAME—CASE STATED—ASCENDING BOAT NOT BOUND TO WAIT.

The tug K., with a heavy tow, came down the East river with the ebb-tide. Soon after rounding Negro point, and before reaching Hallett's point, she gave one long blast of her whistle, to which the steamer City of S., being then a few hundred yards below Hallett's point, and bound up through the east channel of Hell Gate, replied with one. The tug rounded the point, and took the east channel, and the steamer being then in the same channel, and abreast of Flood rock, a collision followed between the latter and one of the boats in tow of the tug, for which both the steamer and tug were libeled, caused, as the court found, by the swing of the tide, which sets across the channel at the rate of six miles per hour. *Held*, that the tug was in fault for taking the east channel, knowing that a steamer, having the right of way, was coming up through it; and especially so, as she was incumbered with a heavy tow; that the City of S. had a right to assume that the tug would take one of the other channels; that she was not bound to wait below Flood rock to see which channel the tug would take, and that the enforcement of such a rule of navigation in that region would tend to multiply collisions rather than to avert them; that the steamer did all she safely could to avoid the collision, after the intention of the tug became known; and that the libel should therefore be sustained as to the tug, and dismissed as to the steamer.

In Admiralty.

*Carpenter & Mosher*, for libellant.*Wilcox, Adams & Macklin*, for the Springfield.*Frank E. Blackwell*, for the King.

BROWN, J. This libel was filed by the owner of the canal-boats T. M. Slight and W. R. Wheeler to recover for the damages sustained by his boats through a collision with the steamer City of Springfield,

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

in Hell Gate, between Flood rock and the Astoria shore, at about half past 4 o'clock in the afternoon of May 4, 1885. The canal-boats formed part of a tow of the steam-tug Edna B. King, bound westward, with the ebb-tide.

The steamer City of Springfield was upon her usual trip eastward, bound from New York to Hartford. The King was a small tug, having only a 16-inch cylinder, coming from the Sound, with a scow in tow on her port side. At Flushing bay she found the tug-boat Pioneer, with her shaft broken, and drifting with the libellant's canal-boats along-side. The King thereupon undertook to tow these additional boats to New York; and all three were accordingly lashed along her starboard side. Shortly after rounding Negro point, which is about 500 yards to the eastward of Hallett's point, the King gave one long blast of her whistle, as required by the inspectors' rule 5, when approaching a bend in the river. The City of Springfield, being then a few hundred yards below Hallett's point, heard this long whistle, and, shortly after, gave one long blast, which was heard by the pilot of the King. The steamer had come up on the easterly side of Blackwell's island, and had passed near the shore at the Astoria ferry. Ahead of her was a transport with a railway float, which compelled the steamer to go under a slow bell, keeping from 300 to 500 feet astern of the float. To the eastward of Hallett's point there are buildings which, for the most part, obstruct the view across the land. The pilot of the King, at some distance to the eastward of Hallett's point, however, saw the steamer's smoke-stack across the land shortly after her long blast was given; that is, shortly after passing Negro point. The King, after rounding Negro point, did not keep the middle of the channel, but crossed over to the left towards the Long island shore, and ran along near that shore, before reaching Hallett's point. She endeavored to round close to the point, and to go through the east channel; and when from 100 to 200 yards below the point, the Slaight, which was the starboard boat in the tow, swung against the steamer, doing some damage, for which this suit was brought.

The witnesses agree that the collision was nearly abreast of Flood rock, or a little above; but they differ entirely as to the part of the east channel in which the collision occurred. The steamer's witnesses allege that her port side, at the time of the collision, was only from 25 to 100 feet from Flood rock. Many of the other witnesses state that the port side of the tow was only from 25 to 100 feet distant from the Astoria shore. The whole width of the east channel at this point is about 750 feet. The King and her tow were a little less than 100 feet wide; the steamer was 73 feet beam by 290 feet long.

I have carefully considered the conflicting evidence, and am of opinion that the steamer, at the time of the collision, was to the westward of the central line of the east channel, rather than to the eastward of that line. It would be difficult and dangerous, if not wholly impracticable, for so large a steamer as the City of Springfield, going up

against the ebb, to round Hallett's point by going so near the Astoria shore as the witnesses of the libellant and the King allege. The ebb-tide runs around Hallett's point at the rate of about six knots, and the steamer's bows, on striking that swift current, would be so rapidly carried to the westward as to render her for the time unmanageable. Steamers never pursue that course; but, for the reasons just stated, keep in the middle or westerly half of the east channel, so as to head the tide as they round the point. The pilot of the transport, who was but a few hundred feet ahead, and bound westward for the Harlem river, testifies, moreover, that he went up about the middle of the east channel, and, just before the collision, looking astern through the clear water between the steamer and the tow, saw the light at the head of Blackwell's island in range. This would place the steamer in the westerly half of the channel, in accordance with the statement of her own witnesses, and with the usual custom, as well as with the natural probabilities of the case. The testimony of the King's witnesses as to her being so near Hallett's point is probably based upon their close run to Hallett's point as they rounded the point, about a minute before the collision. Flood rock is about 300 yards to the south-west of Hallett's point, and about 150 yards further down the channel. The tide, at the rate of six knots an hour, on turning the point, sweeps downwards and across directly towards Flood rock, and renders navigation there very dangerous to tugs incumbered with heavy tows, even if there are no ascending vessels in the way.

1. The King must be held in fault for this collision, on two grounds: *First*, for undertaking to go down the east channel on her own left, knowing that a steamer was coming up; and, *second*, because her heavy tow, considering the moderate power of her engines, made the attempt to pass the steamer in that location more than usually dangerous. Had there been no other channel than the east channel available to the tug, she would doubtless have had the right of way down, after having given the long blast of her whistle, because she was going with the tide; and the steamer, going against the tide, would have been bound to wait below until the descending vessel had come through the dangerous passage. *The Galatea*, 92 U. S. 439; *The Marshall*, 12 Fed. Rep. 921. This rule is applied wherever the channel is so dangerous that two vessels ought not to attempt to pass each other in it. That is undoubtedly true of the east channel at Hell Gate. But as the rule is founded upon necessity only, it cannot be justly applied where the descending boat has other channels available to her on her own right. In rivers or narrow straits the general rule of navigation is to keep to the right, in the absence of any special reasons for a different course. Such is the international rule. Holt, *Rule Road*, 250. See *International Rule as to Navigation of the Danube*, 5 Desjardins, *Droit Com. Mar.* 43. From Hallett's point, besides the east channel, which is the course to the right for ascending boats, descending boats have two other channels available, namely, the middle chan-



nel, and the westerly or main ship's channel, both of which were free to the tug in this case. It would be extremely onerous and unjust to ascending vessels to hold that a vessel descending with the tide, and having three channels open to her, could rightly cross over to the left side of the stream, and occupy the channel appropriate to ascending vessels, and compel them to wait below until she had passed. This point was directly adjudicated in this court in the case of *The City of Hartford*, 7 Ben. 350, 354. There the schooner coming down through Hell Gate with the ebb-tide, under circumstances quite similar to the present, unnecessarily took the east channel, collided with the steamer while she was upon the turn above Flood rock, and after she had changed her course in rounding about four points. BLATCHFORD, J., in that case, says:

"With the wind north-north-west, and the channel from Negro point to Hallett's point running about east-south-east and north-north-west, and the tide as it was, the schooner, before she starboarded and let her sheet run off, must have been going substantially with the tide, without much aid from the wind, and, if not shaking, was hauled very close to the wind; and it ought to have been seen by the schooner that if the steam-boat should come on, and the schooner should starboard to go down the east channel, the courses of the two vessels would be likely to cross each other, and in such proximity as to involve danger of collision. As it was apparent, therefore, that the steam-boat was not in the main ship-channel or in the middle channel, and as the schooner could equally well have gone down either one of those two channels, I think the schooner must be held in fault for not holding herself up to the wind, and refraining from starboarding and letting her sheet go, until she had gone by the steam-boat. As it was, she, in fact, crossed the bows of the steam-boat as the steam-boat was moving, in the only course and the only channel which the steam-boat could take. This maneuver of the schooner contributed to the collision, and for it the schooner must be held in fault."

The steamer in that case was also held in fault, because she went on "with unabated speed," and did not stop as she might have done, and allow the schooner to pass.

In the present case, the tug had ample notice that the steamer was coming up the east channel. The long whistle that the tug gave was no indication that she intended to take the east channel. The steamer could not assume that the tug was intending to take the east channel, without sufficient notice to her, when the other two channels were equally available. The weight of evidence also is that the more usual practice for tugs with any considerable tows, upon the ebb-tide, is to take the main ship-channel or the middle channel; and all the witnesses agree that it is dangerous for vessels to attempt to pass each other in the east channel between Flood rock and the Astoria shore, on the ebb-tide. The fact, also, that the tug's tow was very cumbersome made her fault in taking the east channel the more gross.

2. As I find upon the facts that the City of Springfield was in the westerly half of the east channel, where she had a right to be, and where it is customary for such vessels to go, the only questions as regards her are (1) whether she was bound to wait below Flood rock,

in order to see whether the tug coming down would take the east channel; and (2) if not bound to wait, whether, after perceiving that the tug was coming down the east channel, the steamer did all that was obligatory upon her to avoid the collision. Upon the facts in the case I think that, as respects the last point, no fault can be attributed to the steamer. There was no notice by whistles or otherwise that the tug was intending to come down the east channel until she had actually reached Hallett's point, where she gave two whistles. Even at that time it was in her power to go across by way of the middle channel; by her two whistles and almost immediate turn she indicated her intention to come down the east channel. At that time the steamer was already abreast of Flood rock. The steamer was previously going as slow as practicable, and at once stopped. She also reversed her engines. At the time of the collision she was not moving ahead by land, but only holding her own against the tide. Considering the swiftness of the tide, and its strong set towards Flood rock, the steamer, in my judgment, did all that was safe for her to do, under the circumstances, to avoid collision. Had she backed in the water, she would have run the danger of a far more disastrous stranding upon Flood rock.

As I have already said, there is no general rule of navigation which would require the steamer, coming up against the tide through this dangerous channel, to stop and wait below until a vessel coming down with the tide, and under circumstances like the present, has passed. Other channels being available to the descending vessel, the vessel going up, and in the channel on her own right hand, has the right to assume that the other vessel will keep to her right, and take one of the other channels. But if the vessel bound up has notice or can perceive that the descending boat is actually coming through the channel that belongs to the former, the ascending steamer, though she really has the right of way, is bound to yield that right, and to wait, in order to avoid the obvious risk of collision. *The Colombia*, 25 Fed. Rep. 844, and cases cited. So, here, vessels going up through the east channel on the ebb-tide have the right to assume, in the absence of any indication to the contrary, that descending steamers will keep to the right, and pass through one of the other two channels, and not attempt the east channel—*First*, because the east channel is the right-hand channel for ascending boats, and by custom belongs to them; *secondly*, because, by the universal rule of the road in such cases, a steamer coming in the opposite direction should also keep to the right. A steamer going east, in the absence of any indication to the contrary, has a right, therefore, to assume that vessels coming down will not attempt to take the east channel while there is a boat going up, and has a right, therefore, to proceed on her way without stopping.

I am persuaded, moreover, that the contrary rule would greatly increase the dangers of navigation through this narrow and rapid chan-

nel. If steamers going east were bound to wait below from the moment they heard one long whistle from a steamer after rounding Negro point, this would practically be an invitation to steamers coming down to take the east channel; and this would soon ripen into a customary right to this course. Vessels often come down with the ebb-tide in rapid succession. If the steamer below must wait for one to pass, she must wait for all. While thus waiting, and in the busy traffic that is often found there, ascending vessels would at times accumulate below, among and between which all the vessels coming down with the rapid tide through the east channel would be obliged to thread their way; and in the swift and crossing tide, and with comparatively small headway through the water, the exact course of the descending vessels could not be accurately foreseen. No rule of navigation, it seems to me, could be more onerous upon ascending steamers, or more dangerous in its probable results to all concerned, than such a one.

In this case no signal except the one long whistle was given by the tug until the steamer had already reached Flood rock, where she could not safely back. The long whistle was no indication that the tug would take the east channel, because there were two other channels available to her, on her own right hand around the bend. In practice such a whistle is not understood as any indication of an intent to take the east channel. The tug, knowing that a steamer was coming up, was bound to take one of the other channels. Under such circumstances I cannot hold the steamer bound to have waited below, merely to see whether the tug would violate her obligation to take one of the other two channels. Before the reef off Hallett's point was blasted away some years since, the custom was well settled that tugs with tows, coming down with the tide, must take one of the other channels. Since this reef was blasted off, and the channel round Hallett's point widened by several hundred feet, the evidence seems to show that a practice has sprung up, to some extent, for tugs to take the east channel, keeping on the east side, out of the way of ascending steamers. It is manifest that there is more or less danger always attending these maneuvers; and even if they pass safely round Hallett's point, they are obliged, a little below, to cross the bows of steamers that are frequently coming up on the easterly side of Blackwell's island. The saving of time by taking the east channel is at most not over two or three minutes. There is no reasonable excuse for descending tugs thus to incur a risk of collision whenever vessels coming up are in sight before rounding Hallett's point. Such navigation must be held to be at the peril of the vessels that choose it; and no encouragement should be afforded it by holding that steamers going up should anticipate any such navigation on the part of descending steamers, or should invite it, by waiting for it, except upon a clear agreement by mutually assenting signals. It is to be hoped that the recent blasting of Flood rock and the adjacent reefs will

prove effectual in removing the obstructions that have so long made that passage dangerous.

The libel is dismissed, with costs, as respects the City of Springfield; and the libellant is entitled to a decree against the Edna B. King, with costs.

### LAW v. BAKER and others.<sup>1</sup>

(District Court, N. D. Illinois. January 4, 1886.)

#### 1. COLLISION—MANAGEMENT OF VESSELS IN TOW.

A tow was made up as follows: Libellant's schooner next to and astern of the tug; astern of the libellant, a second schooner; and astern of all, a third, that of the respondents. The distance between the stern of the first and the bow of the last schooner was about 1,200 feet. Each schooner had some portion of her sail set, but as the wind was light and ahead, the sails of all were trimmed flat aft. A squall came up, and with it the wind increased and shifted, coming out on the starboard quarter of each of the vessels. Libellant's vessel, by reason of the fact that her head-sails were down and her after-sails set, was forced up in the direction of the wind, but was prevented from going around by a counter-force, that of the hawsers, by which her bow was secured to the tug, and her stern to the second schooner in the tow, the latter vessel having in the mean while, in consequence of the squall, left her original position astern of the libellant, and had ranged up on her (the libellant's) port side. The third schooner, that of the respondents, was cast adrift by the second, and collided with the first. *Held* that, under the circumstances of the case, the collision was caused by no fault of the respondents, but by the negligence of the libellant, in having the vessel under after-sail only, whereby she became unmanageable.

#### 2. SAME—LOOKOUT.

*Held*, that the collision having been caused by the negligence of the libellant, the temporary absence of the respondents' lookout, not having contributed thereto, was immaterial.

#### 3. SAME—CREDIBILITY OF TESTIMONY.

*Held*, that the credibility of the testimony of libellant's crew with regard to the movements of respondents' vessel is much weakened by the fact that they were panic-stricken, and took to their boats as soon as respondents' vessel was seen heading towards them.

In Admiralty.

W. H. Condon, for libellant.

Robert Rae and C. E. Kremer, for respondents.

BLODGETT, J. The libellant, as owner of the schooner Lizzie Law, seeks to recover damages sustained by the Law from a collision which occurred on the waters of Lake Huron on the night of June 8, 1882, between said schooner and the schooner R. B. Hayes, owned by respondents. The admitted facts are that on the night in question the tug John Martin was proceeding down Lake Huron with the schooners Lizzie Law, W. S. Crossthwaite, and R. B. Hayes in tow, in the order named. The course of the tug was about S. by E., and the wind about dead ahead, when the wind shifted to N. N. W., and a

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

squall came up, which resulted in putting the Hayes and Law into such positions relative to each other as to cause the collision.

It is claimed on the part of the libellant that the collision was caused by negligence on the part of the Hayes in not having a sufficient watch on deck to properly handle her in the squall; that the sails carried by the Hayes before the squall came up should have been taken in before the squall struck; that the Hayes, when struck by the squall, changed her course, and went off to the westward, and then changed her course to the eastward, and ran into the Law, as the Law was following astern of the tug; that the Hayes had no proper lookout; and that the collision occurred by reason of these changes of course, insufficient watch on deck, and want of proper lookout on the part of the Hayes.

The case was referred to the commissioner, who heard the proof, and finds by his report that the Hayes was at fault, and that respondents, her owners, are liable for the damages sustained by the Law. To these findings of the commissioner the respondents have excepted, and the questions of fact before the commissioner have been reargued.

The proof shows that the night was pleasant up to about half past 10 o'clock, with but little wind, and that from nearly the same direction in which the tug with her tows was running,—that is, about S., or S. by E.; that all the schooners in the tow had a part of their sails set, but trimmed flat aft, so as not to impede the tug; that the Law was towed directly astern of the tug, with about 500 feet of line; the Crossthwaite, directly astern of the Law, with about the same length of line; and the Hayes, with about the same line, astern of the Crossthwaite. The Crossthwaite being about 200 feet long, the distance between the stern of the Law and the bow of the Hayes would be about 1,200 feet.

It is difficult to determine from the proof, with even approximate certainty, just how much warning the officers and crew in charge of the decks of these vessels had of the approach of the squall. But it sufficiently appears that there was some warning or indications of a thunder storm gathering in the north-west, and the crews of all the vessels seem to have done something towards taking in part of their sails. All agree that the squall was of very brief duration, and not very heavy or dangerous at any time. It seems undisputed, also, that the Crossthwaite ran up and passed the Law on the Law's port side, so that at the time of the collision the Law lay off the starboard side of the Crossthwaite.

It is contended on the part of the respondents that when the squall struck them, the Law had taken down her forward sails, leaving her after-sails up, or part of them, so that when struck by the squall from N. W. or N. N. W., she broached to, or came up towards the wind so as to lie directly athwart the course of the Hayes, thereby causing the collision before the course of the Hayes could be sufficiently changed to avoid it. A careful study of the testimony satisfies me

that the head-sails of the Law were taken in, and the mainsail and part of her mizzen were up when the squall struck her, and that with these sails trimmed flat aft, and the squall coming from N. W. or N. N. W., the Law would naturally broach to or come up to the wind, the only force to prevent her from coming clear around being her tow-line attached to the tug; and with the Crossthwaite off to the eastward or port side, her tow line would naturally help to hold the Law in this position,—that of lying nearly broadside to the wind. The proof from the tug is, to my mind, quite conclusive that the Law did broach to, as is contended on the part of the respondent; and that, while she lay thus broached to, the lookout of the Hayes, when from 300 to 400 feet from her, saw her position, when the wheel of the Hayes was put to starboard for the purpose of keeping off and passing under the Law's stern, but they were too near to make this maneuver successful, and the collision occurred.

As to the alleged negligence on the part of the Hayes, the proof satisfied me that her head-sails were up and that her mainsail had been taken in before the squall struck her. With her sails in this position, she could not have gone off to the westward by the action of a N. W. or N. N. W. wind, unless her wheel has been put hard over to port, which was not done; that is, all the affirmative proof is that it was not done, nor ordered to be done, and there was no occasion for giving any such order. The proper thing for the Hayes to do under the circumstances was to follow, as nearly as she could, in the line of the other tows ahead of her, and this the officer of her deck and her wheelsman testify they endeavored to do; that is, they kept their course. For some unexplained reason the line of the Hayes was cast off from the Crossthwaite, but I do not see that this in any way affected or brought on the collision. Probably when the officer in command of the Crossthwaite saw that he must change his vessel's course to avoid the Law, which had broached to ahead of him, he also thought the line of the Hayes would embarrass him in swinging clear of the Law, and cast it off for that reason; but this is mere conjecture, as neither party deemed the matter of consequence enough to prove or attempt to prove why it was done.

As I gather the facts from the testimony, it seems improbable to me that Capt. Leith, of the Law, could have seen the Hayes off 1,000 feet to the westward of him, and then seen her change her course, and come stem on towards the broadside of the Law. It seems to me much more probable that the Law lay broached to in the pathway of the Hayes, and while her officers and crew were engaged in their effort to get her mizzen and main sails down, without being conscious of the direction in which the Law was heading, they saw the Hayes coming directly towards their broadside. If the Law had been heading to the south, as she was when struck by the squall, the Hayes must have been coming from the westward to have been seen coming directly toward the Law's broadside; but if the Law had broached to, as I

conclude she did, then the Hayes, without change of course, would be seen coming stem on to the Law's broadside.

The reliability of the testimony from the deck of the Law is much shaken, to my mind, by the fact that as soon as the Hayes was seen heading for the Law, her officers and crew took to their boats; and when the collision occurred, there was no one on the Law except a seaman who had been sent to the mizzen cross-trees to loosen the mizzen halyards that had got fouled there. The fact that these men fled so precipitately on the first appearance of danger certainly very much weakens their reliability as witnesses as to what took place, either on their ship or on the Hayes.

I therefore conclude that, at the time the collision occurred, the Law lay broached to in the course of the Hayes, and was held nearly stationary there by the action of the lines from her bow to the tug, and from her stern to the Crossthwaite, and that her broaching to was in consequence of the bad seamanship of her crew in taking off her jibs, and leaving on her mainsail and mizzen. All the proof concurs that the wind shifted to the north-west before the squall came up. A thunder shower was gathering in the north-west, and the premonition therefore was that if there was an increase of wind, it would be from that direction, and any seaman ought to have known that by taking off his jibs and other forward sails, he was putting his ship in an unmanageable condition, and all the testimony agrees that if the Law's head-sails were up, and her after-sails down, she would have been unmanageable, and would have broached to.

It is also urged that the want of a proper lookout on the Hayes contributed to this collision. The proof shows that the watch on deck consisted of the second mate, Wilson, and the wheelsman, and that Wilson acted as lookout. In a quiet night such as the proof shows this to have been, this would seem to have been a sufficient watch for a vessel in tow of a tug, as the Hayes was. The captain of the Hayes was disabled by a sprained or broken ankle, and as soon as the weather became threatening, the first mate was called, who came at once on deck, and he and the second mate lowered the mainsail, and it was fully down five to ten minutes before the squall struck her. As soon as the mainsail was down, Lawson, the mate, went forward as lookout, and remained there till the collision occurred, the second mate remaining near the wheelsman; and when the order to starboard the wheel came from the mate on his sighting the Law broadside to ahead of him, Wilson helped the wheelsman to promptly execute the order. I cannot see what could have been done by more men, if they had been on deck, than was done by these towards averting the collision. The movement of the Hayes through the water was probably accelerated by the wind, and the Law was seen by Lawson, acting as lookout, as soon as the mist or fog would allow, and more men on deck would not have seen her sooner. The Hayes was a logy, dull sailor, that did not respond promptly to her wheel, but not to such an ex-

tent as to make her a dangerous vessel towards others in a tow that was properly handled.

It is true that for a few moments while the second mate was calling the first mate, and while they were taking in the mainsail, the Hayes had no lookout; but this, it must be remembered, was before the squall struck her, and while all the vessels were in control of the tug, and in their proper places. With the squall, there seems, from the proof, to have come a blinding mist or fog, which momentarily shut these vessels off from sight of each other; and when this fog or mist passed by with the squall that brought it, the witnesses from the Crossthwaite and the tug saw the Law lying with her head to the westward of her, and the Hayes was approaching her from the direction in which the tow had been running, and the collision occurred. If the Law had not been broached to, it would seem hardly possible that the two vessels would have collided. What the testimony shows as to the sailing and handling qualities of the Hayes confirms me in the conviction that she did not shoot off to the west in a tangent from her regular course, and then as quickly change and come back towards the east, and collide with the Law, but her very dullness would have helped to keep her in place upon her course; while the Law, being a quick handler and carrying a large amount of sail for her size, would, with her head-sails off, and her after-sails set, come up in spite of her rudder by the action of the wind from the northwest. It therefore seems to me that no such fault can be properly charged to the Hayes as contributed directly to bring about this collision, and I feel compelled to sustain the exceptions to the commissioner's report, and to find the respondents in no way at fault for the damages sustained by the Law.

I may add that it seems to me the commissioner arrived at his conclusions by placing an undue weight upon the mere opinions of the witness Wilson, the second mate of the Hayes. When this witness testifies as to facts within his knowledge, he seems to me usually intelligent and accurate; but when he attempts to express his opinions as to whether the deck of the Hayes had a sufficient complement of men to insure her safe navigation, those opinions seem colored with some peculiar views of his own as to the number of seamen that every vessel ought by law to be compelled to carry. The commissioner has also attached, as it seems to me, undue weight to the statement of Fitzsimmons, one of the mates of the Law, that the mainsail of the Hayes was up when he came on deck, just before the collision. As this witness had no better opportunities for knowing this fact than several others who have that testified it was down, the mere fact that the deposition of this witness, which was taken by respondents after libellant had failed to take it, should not, as it seems to me, endue his testimony with any more character for truthfulness than if it had been taken by the libelants. In fact, I cannot see that the question whether the Hayes' mainsail was up or down is controlling; as, with



all her forward sails set, the mainsail alone, without aid from the rudder, would not have caused her to run off to the westward, as described by the captain of the Law.

I regret to be compelled to overrule the finding of the commissioner, as no one more fully than myself appreciates his painstaking analysis of testimony, and his usually accurate conclusions as to the facts of a case. The exceptions are sustained. The finding will therefore be that the collision did not occur by reason of the fault of those in charge of the Hayes, and the libel dismissed.

*In re* Petition of VESSEL OWNERS' TOWING Co., to Limit its Liability, etc.<sup>1</sup>

(District Court, N. D. Illinois. January 6, 1886.)

SHIPS AND SHIPPING—LIMITED LIABILITY OF VESSEL OWNERS—SECTION 4283, REV. ST., CONSTRUED.

A vessel must be engaged in interstate or foreign commerce to entitle her owners to claim a limited liability. A tug engaged in towing, into the waters and ports of other states, vessels engaged in interstate commerce is as much engaged in such commerce as are the vessels themselves. The purpose of the act was to limit the liability of the vessel owner, and it applies to *any* damage done by the vessel, irrespective of the locality of the thing injured, if there be no fault or privity on the part of the owner or owners of the vessel.

In Admiralty. On exceptions to commissioner's report.

*Schuyler & Kremer*, for petitioner, the Vessel Owners' Towing Company.

*F. M. Williams* and *M. St. C. Thomas*, for Chalifoux.

*J. J. Flannery*, for Murphy.

*Shufeldt & Westover*, for Hanson.

*Clarence Knight*, City Atty., for the City of Chicago.

*W. H. Condon*, for Clifford and Mary and James Foley.

BLODGETT, J. This is a petition of the Vessel Owners' Towing Company for limitation of liability, as owner of the tug Thomas Hood, for a collision with the west abutment of the Adams-street bridge, on September 28, 1883, by the schooner David Vance while in tow of said tug. The result of the collision was the fall of a section of the Adams-street viaduct, resting on the abutment, and injuries were sustained by the city of Chicago, as the owner of the abutment and viaduct, and by persons and property upon the viaduct at the time of its fall. This petition is filed under the act of congress passed March 3, 1851, to limit the liability of ship-owners, etc. The defense is that the tug was not engaged in interstate or foreign commerce, and was not, therefore, entitled to the benefit of the act.

<sup>1</sup>Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

From the evidence presented, two questions arise: *First.* Is the Hood such a vessel as entitles her owner to the benefit of the act of congress which limits the liability of the owner to the value of the vessel and her freight then pending? *Second.* Is the liability of petitioner for the damages in question such a liability as comes within the provisions of the law invoked; the abutment and viaduct not being in the waters of Chicago river, but upon the bank of the river adjoining the water?

As to the first question. The act of March 3, 1851, (section 4283, Rev. St.,) provides that the owner of a vessel shall not be liable for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner, beyond the value of his interest in such vessel and her freight, then pending; and while the act does not, by its terms, limit its operation to vessels engaged in interstate or foreign commerce, undoubtedly the power of congress to legislate on the subject is to be found only in the provisions of section 8, art. 1, of the constitution, which authorizes it "to regulate commerce with foreign nations and among the several states;" and if the tug in question is not a vessel employed in the business of interstate or foreign commerce, then she is not within the terms of the act of congress, and her owners cannot claim the benefit of its provision. While this tug does not herself carry freight or passengers, the subject of interstate and foreign commerce, the facts, as found by the commissioner, show that her employment consists almost wholly in towing into and out of the Chicago harbor, and upon the waters of Lake Michigan, vessels that are engaged in such commerce, and that her voyages in such employment often take her from Chicago, her home port, into the waters and ports of other states, and it seems very clear that, as an indispensable aid and adjunct to such vessels, she may be said to be employed in such commerce, and, while towing the grain, lumber, and coal laden vessels which ply between the port of Chicago and other ports upon the Great Lakes, this tug is as much engaged in commerce as the vessels themselves; and in the present mode of doing business,—especially through the agency of sail-vessels employed upon these lakes,—the tug-boat is as much a part of the commercial marine as the vessels in whose hulls the cargoes are actually carried. From the nature of her employment, this tug seems to come within the principle of the law invoked. She, in pursuit of her business, is subject to all the risks and perils of the sea incident to a commercial vessel, especially to risks of collision and explosion. Her owner takes the same risk that she may, by colliding with another vessel, through the neglect or want of skill of the pilot or other employes, or by explosion, through the negligence or incompetency of an engineer, incur a heavy liability for damages, that is taken by the owners of vessels that ply from port to port upon the errands of interstate or foreign commerce.

Therefore it seems she is clearly within the spirit and scope of the act of congress. The supreme court has said that "the object of this act was to encourage the building of ships;" by saying, in effect, that the "only risk of the owner should be his investment in the ship." And why ought not this rule to extend to a man who builds a tug-boat used in commerce, as well as to the ship that carries the commodities in her hold?

As to the second question. It is conceded that if a towing tug, like the Hood, be a vessel within the scope of the law, and she had done damage, without the privity of her owner, while upon the waters of the Chicago river, to any vessel or property floating upon the river, the owner would not be liable beyond her value; but it is contended that as the thing damaged was not upon the river, and did not pertain to commerce, such damage does not fall within the intent of the law. The terms of the act, however, are very broad: "*For any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of the owner,*" the owner shall only be liable to the extent of the value of his interest in the vessel and freight pending. But the situation of docks, walls of warehouses, and bridge abutments, arising up from the water's edge renders collisions with them not only possible, but probable, and constitutes one of the perils of navigation while vessels are upon the waters of rivers or harbors. A steamer, for instance, is liable to explode at a dock in a harbor, and injure persons and property on the land to a far greater amount than her value; or a tug is liable to so handle her tow as to cause her to collide with the walls of a warehouse, or building, or bridge structure adjacent to the water's edge.

It seems to me the purpose of the act was to limit the liability of the owner as to any damage his vessel should do without his privity or knowledge whether the person or thing damaged was upon the water or the land, as the risk of damaging things upon the land, especially with a steam-vessel, is as great as that of damaging things upon the water.

The commissioner's report is therefore approved, and a decree will be entered limiting the liability of the petitioner to the value of the tug.

*In re* Petition of VESSEL OWNERS' TOWING Co., to Limit its Liability,  
etc.<sup>1</sup>

(District Court, N. D. Illinois. May 27, 1884.)

SHIPS AND SHIPPING—LIMITED LIABILITY OF VESSEL OWNERS—SECTION 4283,  
REV. ST., CONSTRUED.

Congress having, in express terms, limited the liability of vessel owners, the protection of the statute may be invoked, notwithstanding the fact that the thing injured is situated on land, if the damage in question be occasioned by the vessel, and without any fault or privity on the part of her owner or owners. *The Plymouth*, 3 Wall. 20, distinguished.

In Admiralty. On demurrer.

*Schuyler & Kremer*, for petitioner, the Vessel Owners' Towing Company.

*F. M. Williams* and *M. St. C. Thomas*, for Chalifoux.

*J. J. Flannery*, for Murphy.

*Shufeldt & Westover*, for Hanson.

*Clarence Knight*, City Atty., for the City of Chicago.

*W. H. Condon*, for Clifford and Mary and James Foley.

BLODGETT, J. This is a petition by the Vessel Owners' Towing Company, as owners of the tug *Thomas Hood*, for a limitation of liability under the provisions of section 4283 of the Revised Statutes, by reason of certain injuries committed by the tug, as is alleged, without the fault or privity of petitioner.

It appears from the petition that the tug is employed upon the waters of the Chicago river and Chicago harbor and vicinity as a towing tug, and that in that capacity, on the twenty-eighth of September last, this tug took in tow the schooner *David Vance* to tow her from some point near Wells-street bridge to an elevator near Sixteenth street, on the south branch of the Chicago river, and while so in tow of the tug the schooner struck the abutment of the Adams-street viaduct at the Adams-street bridge, and broke it down, and caused a portion of the viaduct to fall, thereby damaging, not only the viaduct, but several persons and some property on the viaduct at the time. One of the persons who has been cited to show cause why a decree of limitation of liability should not be entered is J. D. Chalifoux, who has demurred to the petition upon the ground that it does not show a case coming within the provisions of the section in question.

The question is an anomalous one. The counsel for respondent, in their brief, seem to rely mainly on the *Case of the Plymouth*, reported in 3 Wall. 20. This case was where a steamer lying alongside a dock in this city took fire, and the fire communicated to the packing-house of Hough & Co., and destroyed it. A libel *in personam*, against the owners of the steamer, was filed by Hough & Co., to re-

<sup>1</sup>Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

cover damages by reason of the burning of their warehouse, on the ground that it was a marine tort. The case was first heard before Judge DRUMMOND, then district judge, who held that an injury by a ship or vessel to anything upon land was not a marine tort, and therefore admiralty had no jurisdiction in the premises. This case was affirmed by Mr. Justice DAVIS, sitting as circuit judge, and subsequently by the supreme court. It differs from the case now before me, in this: the only question there was whether that was a marine tort, and therefore within admiralty jurisdiction; but this case is essentially different in principle. It is upon a special statute limiting the liability of ship-owners for damages done by their vessel. The section under which it is brought reads as follows:

Sec. 4283. "The liability of the owner of any vessel for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

It appears from the petition that this schooner, while in tow of the tug, was, without the fault or privity of petitioner, so negligently or carelessly handled by the tug, that she struck the viaduct of the Adams-street bridge, damaging the viaduct to some extent, and persons and property thereon, and that the aggregate of the damage to the viaduct, property, and persons exceeds the value of the tug. It is claimed, as the property injured was upon the land, and the offending thing upon the water, that the injury is not one contemplated by the act; but the language of the statute is very broad, and the supreme court has several times interpreted the purpose of congress in passing this act, which was to encourage the building of ships, and to encourage commerce by giving to those who should build ships the assurance that they can only be made liable to the extent of the venture made in their ships; that if a man builds a ship for the purposes of commerce, equips and mans it in a proper manner, and sends it about the business of commerce, he shall only be liable to the extent of his investment in that property, unless the injury shall be occasioned by his privity or neglect. In entering the harbors of the lakes, and also upon the seaboard, vessels propelled by steam come in close proximity to the land; and suppose a steam-ship, properly built and equipped, explodes her boiler by the carelessness of the engineer, the boiler having been properly constructed so far as the owner is concerned, in the vicinity of a large warehouse, thereby causing its destruction, through the negligence of the parties in charge of the ship, is the owner of the ship to be held responsible, in the light of this act, for the destruction thereby occasioned? The injury would seem to be such as would come within the language of the statute, and although the question is a new one, and has not

been yet directly adjudicated upon, I am of opinion that the case made by the petition comes within the provisions of the statute, and entitles the petitioner to relief. The demurrer is therefore overruled.

### THE YOUNG AMERICA.<sup>1</sup>

#### GALLAGHER v. THE YOUNG AMERICA, etc.

(District Court, S. D. New York. January 21, 1886.)

1. TOWAGE—ICE IN CHANNEL—TUG FORCED TO SHORE—STRANDING OF CANAL-BOAT—BURDEN OF PROOF—NEGLIGENCE.

The tug Y. A. came from Perth Amboy to New York, around the southern shore of Staten island, towing a fleet of canal-boats, among which was libellant's boat, B. On coming through the lower bay she met a large field of ice, which forced her to the extreme westerly side of the channel, where the B. struck on a rock. *Held*, that the tug was liable only for want of care, under the circumstances that she met; that the burden of proof was on the libellant; and that, on the evidence, the stranding was not caused by the tug's negligence.

2. SAME—ABANDONMENT OF WRECK—SUBSEQUENT POSSESSION BY WRECKERS—DISPUTED AUTHORITY—INCREASED DAMAGE—INDEPENDENT CAUSES—DAMAGES DIVIDED.

After the accident, the tug came on to New York with the remainder of the fleet, leaving no one in charge of the B. Aid being subsequently sent, the canal-boat was found in the possession of wreckers, and, owing to the disputed authority, and the difficulties and delays arising from it, she became almost a total loss. The evidence indicated that but from this interference the loss would have been greatly lessened. *Held*, that it was the tug's duty, having the custody of the canal-boat, to have made all necessary arrangements before leaving her to prevent her falling into the hands of third persons under color of authority. Not having done so, and it being impossible to determine with exactness how much of the whole loss was attributable to the original stranding, and how much to the subsequent want of protection, *held*, the damages should be divided.

In Admiralty.

*Hyland & Zabriskie*, for libellant.

*Wilcox, Adams & Macklin*, for claimants.

BROWN, J. The libellant was the owner of the canal-boat Beakly, which was one of 24 boats forming a flotilla, composed of six tiers, of four boats in a tier, in tow of the steam-tug Young America, upon a hawser. The libellant's boat was the outer boat on the port side of the fourth tier. On the twelfth of February, 1885, the Young America started from Perth Amboy to tow the fleet to New York. Finding the Kills choked with ice, and impassable, she came through the lower bay, along the southern shore of Staten island. After passing between the Can and Spar buoys, about half a mile below the Narrows, she met, as her witnesses allege, a large field of ice coming up

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

from the bay with the flood-tide. By this ice, and the set of the flood-tide towards the Staten island shore, as they allege, the fleet was crowded to the extreme westerly side of the channel, so that the libellant's boat, when about opposite Fort Wadsworth, in the narrowest part of the strait, struck upon a rock, and subsequently became nearly a total loss. This libel was filed to recover the damages.

The witnesses for the libellant allege that there was little or no ice to obstruct the course of the tug. On their part it is claimed that the accident arose through the inexperience of the pilot, and his voluntary selection of the westerly shore; and that he ran upon the rocks because he mistook his proper course, and passed too near Fort Wadsworth. A number of witnesses on the part of the libellant state that there was no ice. It is also urged that the tide was no longer running flood at the time of the accident, which was after dark, and about 6:30 p. m. The evidence as to the precise time, however, is not so certain as to admit of any reliance upon the arguments founded upon a supposed change of the tide.

There is no evidence in the case of such circumstances existing at the time the fleet set out from Perth Amboy as would make the tug chargeable with negligence for starting out, and undertaking to bring up the tow. She is liable, therefore, only upon proof of want of suitable care and skill under the circumstances that she met. The burden of proof to show negligence is upon the libellant. I have carefully considered the testimony of the numerous witnesses in the case. I find it impossible to hold that the libellant makes out, by any preponderance of proof, that the course through the Narrows was free from ice. On the contrary, I must hold that the preponderance of proof is the other way, and that the tow was crowded in towards the shore, as the claimants' witnesses allege. Most of the witnesses for the libellant were not discharging any duties that required them to observe carefully as to the existence of ice; much less to navigate with reference to it. It was a cold night. They were going in and out of their cabins, and they were not in a situation that would naturally direct their attention specially to the conditions with which the tug had to contend. There was no ice on the port side, where the libellant was. What ice there was, was on the opposite side of the tow, some 60 feet distant from him, and it was dark. The evidence on the part of the witnesses for the tug is so minute and detailed that their story cannot be discredited, without assuming on their part gross fabrication and perjury. Their statements are also confirmed in some measure by the evidence from a steamer that went down the bay the same night, and encountered so much ice in the same place that she was obliged to put back. The fact that another tug a quarter of a mile or a half mile ahead escaped, is not inconsistent with the claimants' story. Their evidence shows that, during a period of from 20 minutes to half an hour, their powerful tug was pulling almost directly to the eastward away from the shore,

and that the helper tug went three times around the tow trying to break or loosen the ice. I cannot find any omission of duty or skill under the circumstances; and I must hold, therefore, that the tug is not answerable as for any negligence in causing the libelant's boat to strike upon the rock.

The evidence shows, however, that after she had struck and attempts had been made by the helper tug to pump her out, so that she might be towed away, she was left without any persons in charge; and that afterwards some persons upon the shore, claiming authority as wreckers, took possession of the boat, and prevented the claimants from again resuming possession and raising her, as they attempted to do, with a wrecking-boat sent down for that purpose; and that, in consequence of this disputed authority, and the difficulties and delays arising from it, the libelant's boat became a wreck. The evidence indicates pretty clearly that but for this interference the boat might have been raised, and the loss very greatly lessened. I think it was the claimants' duty, having the custody and charge of the libelant's boat, to have made all necessary arrangements before leaving her to prevent her from falling into the hands of third persons under color of authority. The libelant was not in charge of her, and he had no power to do anything for her protection. It was in the power of the claimants; and, as I have said, the boat was in their custody. They must be held answerable, therefore, for the great increase of the damages, through their fault, which contributed to the final loss. The nature of the case is such that it seems clearly impossible to determine with any approximation to exactness how much of the whole loss is attributable to the original stranding, and how much to the subsequent want of protection. The best that can be done under such circumstances is to divide the damages, as was done in the case of *Snow v. Carruth*, 1 Spr. 324; and see *The Shand*, 16 Fed. Rep. 570, 572-574; *The Max Morris*, 24 Fed. Rep. 860, 863.



## LYDDY v. GANO, Ex'x, Etc., and others.

*(Circuit Court, S. D. New York. 1886.)*

## REMOVAL OF CAUSE—SEPARABLE CONTROVERSY—CITIZENSHIP.

A., a citizen of New York, filed a bill as creditor of B., deceased, in the state court, against his heirs at law, to compel satisfaction of his debt, out of real estate in their hands. Some of the defendants were citizens of New York, but others were citizens of another state, and the latter removed the case to the federal court. Under the New York statute, although the heirs at law were respectively liable to the extent of the estate which had descended to them, all of such heirs were, nevertheless, indispensable parties to the suit. *Held*, that the suit did not present a separable controversy which could be determined, as between the removing defendants and complainant, without the presence of the other defendants who were citizens of New York, and that the cause should be remanded.

## On Motion to Remand.

WALLACE, J. The complainant, a citizen of this state, has filed a bill as a creditor of one McCunn, deceased, against the heirs at law of the deceased, to compel satisfaction of his debt out of the real estate now in their hands, which descended or was devised to them. Some of the defendants are citizens of this state, but others, those upon whose petition the suit was removed here from the state court, are citizens of other states. The rights and remedies of creditors against heirs and devisees of a deceased person are wholly controlled by statutory law in this state, and the contention of the defendants is that the heirs are severally and not jointly liable to the payment of their proportionate share of the creditor's demand, out of the real estate in their hands. Although they are respectively liable to the extent of the estate which has descended to them, nevertheless all the heirs are indispensable parties to the suit. If the suit were brought against one only of the heirs, it would be an unanswerable objection to the relief sought, that all were not made parties. *Dodge v. Stevens*, 94 N. Y. 216; *Wainburgh v. Gates*, 11 Paige, 513; *Parson v. Brown*, 7 Paige, 354. The suit, therefore, does not present a separable controversy which can be determined, as between the removing defendants and the complainant, without the presence of the other defendants, who are citizens of this state.

The motion to remand is granted.

v.26F,no.4—12

STATE v. WALRUFF and others.<sup>1</sup>

(Circuit Court, D. Kansas. January 22, 1886.)

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—POWER OF STATE TO PREVENT USE OF PROPERTY IN MANUFACTURE OF LIQUORS WITHOUT COMPENSATION—DUE PROCESS OF LAW.

Between 1870 and 1874 defendants constructed a brewery in Lawrence, Kansas. The building, machinery, and fixtures were designed and adapted for the making of beer, and nothing else. For such purpose they were worth \$50,000; for any other purpose not to exceed \$5,000. At the time of the erection of the building, and up to 1880, the making of beer was legal, but in that year a constitutional amendment was adopted, prohibiting the manufacture of beer except for medicinal, scientific, and mechanical purposes, and in 1881 and 1885 laws were enacted to carry this prohibition into effect. Under these laws a permit was essential for the manufacture for the excepted purposes. To the defendants this permit was refused. An injunction was thereupon sued out from the state court, enjoining defendants *absolutely* from the manufacture of beer. *Held* that, in so far as the constitutional amendment, and the statutes passed in pursuance thereof, deprived defendants of the use of their property, acquired previous to the adoption of the amendment, without compensation, they deprived them of their property without due process of law, within the meaning of the fourteenth amendment to the constitution of the United States, and were void.<sup>2</sup>

2. SAME—REMOVAL OF CAUSE—FEDERAL QUESTION.

*Held, further*, that the construction of the constitutional amendment and the acts of 1881 and 1885, under the circumstances of this case, presented a federal question, and the defendants had the right to remove the case from the state court to the United States circuit court for decision.

On Motion by Plaintiff to Remand Case to State Court. The opinion states the facts.

*R. A. French, Geo. J. Barker, C. S. Gleed, and J. W. Gleed*, for plaintiff.

This is a civil case commenced in the district court of Douglas county, state of Kansas, by the county attorney of said county, to abate an alleged nuisance, to-wit, a place where intoxicating liquors are manufactured, bartered, sold, and given away, in violation of the prohibitory liquor law of the state, (chapter 128, Laws 1881, as amended by chapter 149, Laws 1885.) The defendants filed with the clerk of the district court a bond and petition for removal to this court, and, on the hearing of said petition, the same was overruled by the judge of said court, and said case held for trial. The defendants thereupon filed in this court transcripts of the records therein, and had said action placed upon the docket of this court. This action is removable, if removable at all, under the removal act of 1875, and under the second paragraph of that act, which is as follows:

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution and laws of the United States, or treaties made," etc.

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

<sup>2</sup> See note at end of case.

The questions, then, to be determined by this tribunal at this time are: (1) Whether the matter in dispute in this case exceeds, exclusive of costs, the value of \$500; and (2) whether the matter in dispute in this case arises under the constitution or laws or treaties of the United States. And from the record the affirmative of these two questions must appear, if the case is to be held removable, and the motion to remand is to be overruled.

Does the matter in dispute in this case arise under the constitution or laws of the United States? It has been repeatedly held "that a case in law or equity may properly be said to arise under the constitution or laws of the United States, whenever its correct decision depends upon the construction of either." *Cohen v. Virginia*, 6 Wheat. 379. Also, *Mayor v. Cooper*, 6 Wall. 252; *Osborn v. Bank of U. S.*, 9 Wheat. 816; *Gold-washing & Water Co. v. Keyes*, 96 U. S. 201; *Tennessee v. Davis*, 100 U. S. 264; *New Orleans M. & T. R. N. v. State*, 102 U. S. 135.

Does a correct decision of this case depend upon the construction of the constitution or laws of the United States? We claim not. We claim that this case can be properly decided without reference to the constitution or laws of the United States. Is not this a proper test as to whether correct decision of this case depends on the construction of the constitution or laws of the United States? Suppose the state court grant the prayer of this petition, or suppose it deny the prayer, merely as the law and constitution of the state of Kansas direct: in either case will violence have been done to the constitution or laws of the United States? Certainly not, if the prayer be denied. The question, then, becomes simply this: Would the granting of this prayer, so far as is lawful under the laws of Kansas, do violence to the constitution or laws of the United States? Is the law of the state of Kansas, as to the case here presented, in conflict with federal law? If the laws and the constitution of the United States have received such construction by the supreme court as would not make the granting of the prayer here prayed unconstitutional, then there can be no construction of such laws or constitution involved in this controversy, and this court has no jurisdiction. A decision of the supreme court of the United States, that the constitution does not apply to cases and questions like these here presented, is as conclusive as if a statute expressly enacted it. It is well settled that, in the courts of the United States, the special facts necessary for jurisdiction must appear in the record of every suit, and that the right of removal from the state courts to the United States courts is statutory. *Gold-washing & Water Co. v. Keyes*, 96 U. S. 199. For the purpose of the transfer of a cause, the petition for removal which the statute requires performed the office of pleading. The office of pleading is to state facts, not the conclusions of law. Assuming, then, that the facts stated in the petition for removal are true, so far as they are consistent with each other, and leaving out of consideration the con-

clusions of law improperly inserted in that petition, and further assuming that the facts set forth in the plaintiff's petition are true, then would the application of the laws of this state to these facts do violence to those clauses of the constitution upon which defendants rely, namely, the fourth, fifth, and fourteenth amendments? If not, this case should be remanded.

The attention of the court is first called to the facts set forth in the original petition and the petition for removal. Plaintiff's bill or petition in this case alleges, in substance, that certain premises, (describing them,) commonly known as "Walruff's Brewery," is a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are manufactured and kept for barter, sale, and gift, and are sold, bartered, and given away in violation of the law; that said place, in consequence thereof, is a common nuisance, etc.; that said defendants (naming them) are the keepers of and maintain and operate said place, etc.; that said defendants, or either of them, have no permit issued or granted by the probate judge of Douglas county, Kansas, authorizing defendants, nor any or either of them, to manufacture, sell, barter, or give away, or manufacture, or keep for sale, barter, or gift, any intoxicating liquors; that the defendant E. Walruff is the owner of the premises above described, and has full knowledge of the unlawful purposes for which said place is being used, and knows that said premises are being used as a place where intoxicating liquors are *manufactured and kept* for barter, sale, and gift, in violation of the law, and that said E. Walruff has no permit, etc., and that said E. Walruff permits her co-defendants to maintain the said common nuisance; that the said place is a common nuisance of great injury to the public, which injury is irreparable, and cannot be compensated in damages. Such is the gist of plaintiff's cause of action. And the prayer, based on this statement of facts, is as follows:

"*First.* That the said premises, to-wit, a certain brick building situated on numbers thirty-seven, (37,) thirty-nine, (39,) and forty-one, (41,) in block six, (6,) on the west side of Maine street, in the city of Lawrence, county of Douglas, state of Kansas, and also being commonly known as 'Walruff's Brewery,' may be adjudged by the court to be a common nuisance; and that an order may issue directing the sheriff, or other proper officer, to shut up and abate said place. *Second.* That the defendants, and each of them, their agents, servants, and employes, may be perpetually enjoined from using, or permitting to be used, the said premises as a place where intoxicating liquors are manufactured, sold, bartered, or given away, or are manufactured or kept for barter, sale, or gift, otherwise than by authority of law. *Third.* That in the mean time the said defendants, and each of them, their agents, servants, and employes, may be enjoined, until the further order of the court, from keeping open, or permitting to be kept open, the premises above described, and from manufacturing, selling, bartering, or giving away, and from manufacturing, and from keeping for barter, sale, or gift, or use, in or about said premises, any of the intoxicating liquors above described, or permitting such liquors to be manufactured, sold, bartered, or given away, or kept or manufactured," etc.

The further facts proper for this court to consider at this time are such as are properly pleaded in defendants' petition for removal. The conclusions of law in that petition must of course be distinguished from the facts set up therein. The allegations of defendants' petition for removal are as follows:

"That the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars; that defendant E. Walruff is now, and was at the time of the commencement of this action, the owner of the premises in question; that said premises are, for the purposes for which they were designed, worth the sum of \$50,000; that said buildings were erected, between the years 1870 and 1874, for the purpose of *manufacturing* malt liquors, and that at the time of such erection such purpose was legal, and fully authorized by the laws of the state of Kansas; that said buildings, for any other purpose than the manufacture of malt liquors, are not worth to exceed \$5,000; that said buildings and improvements were owned and used by defendants E. Walruff and John Walruff, for the purposes aforesaid, from the time of their erection up to and until the year 1881, without limitation or legal restriction; that by an amendment to the constitution of the state of Kansas, adopted in the year 1880, the manufacture of intoxicating liquors was forever prohibited in said state, except for medicinal, scientific, and mechanical purposes; that on May 1, 1881, a law enacted in pursuance of said amendment went into force; that afterwards, on the seventh day of March, 1885, the legislature enacted an amendment to the law of 1881; that under said constitutional amendment it was lawful to manufacture and sell malt and fermented liquors for medicinal, scientific, and mechanical purposes, without restriction or limitation. [The petition thereafter quotes a portion of the law of the state restricting and regulating the manufacture and sale of intoxicating liquors for medicinal, scientific, and mechanical purposes.] That on the seventh of August, 1883, E. Walruff and John Walruff conveyed to Fritz Iseman and August F. Walruff, by a contract of sale, the premises in question; that afterwards all the parties defendant duly petitioned the probate judge of Douglas county for a permit to manufacture and sell at said brewery malt and fermented liquors for medicinal, mechanical, and scientific purposes, which petitions were refused; that by reason of said action of said probate judge, and of his refusal to grant a permit to manufacture at said brewery and sell malt and fermented liquors for medicinal, scientific, and mechanical purposes, defendants, E. Walruff and John Walruff, Fritz Iseman, and August F. Walruff, have been and are deprived of the use of the brewery property aforesaid, and the value thereof has been greatly impaired, to the amount of forty-five thousand dollars; that John Walruff and E. Walruff have used the said property for the purpose of manufacturing and selling malt and fermented liquors for medicinal, scientific, and mechanical purposes, and desire to continue to so use it; that the defendants are citizens of the United States and of the state of Kansas, and that they have a defense arising under articles 4, 5, and 14 of the amendments to the constitution of the United States; that the effect of this action, if prayer of the petition be granted, will be to deprive defendants of property without due process of law, and subject them to unreasonable seizure of property; that the law of the state of Kansas under which this action was brought is in conflict with the constitution of the United States."

This petition is verified upon belief merely.

Briefly, what are the facts giving rise to this controversy as gathered from the records filed in this case, and what is the law applicable to them as gathered from the decisions and statutes of the state of Kansas? Between the years 1870 and 1874 defendant E. Walruff

invested, as she claims, \$50,000 in a certain property consisting of land, buildings, and fixtures adapted to the manufacture of intoxicating liquors. This court may take notice of the fact, though it is not specially stated in the record, that *sale* of such liquors was the real aim of this investment, and that the premises were adapted to the manufacture of liquors for sale; that, substantially, the privilege to sell what was manufactured was what induced and what made valuable this investment. At the time this investment was made the privilege to sell or give away intoxicating liquors was a wholly conditional, contingent, and defeasible one. The substantial value of this investment lay in the privilege to sell; and this privilege the law distinctly pronounced to be a privilege, and in no sense a right,—a privilege wholly subject to the police power of the state. The privilege to *manufacture* was not, it is true, in terms, restricted; but by a clear and indubitable inference it was. There was a *de facto* commercial limitation. *State v. Mugler*, 29 Kan. 252. The case of *Beer Co. v. Massachusetts*, 97 U. S. 25, holds that the grant of right to manufacture carried with it right to sell. We apprehend, then, that a restriction on the right to sell is *pro tanto* a restriction on the manufacture. The law made this limitation by fair inference. Though it may be said that defendant might have manufactured in this state and sold in another, it is answered that a state, in the enactment of law, generally contemplates the existence of no other sovereignty but itself. In 1880 an amendment to the constitution of the state was enacted, providing that the *sale* of intoxicating liquors shall be forever prohibited in this state, except for medicinal, scientific, and mechanical purposes. That amendment was, by the supreme court of the state of Kansas, declared not to be in conflict with the constitution of the United States. *Prohibitory Amendment Cases*, 24 Kan. 100. This decision is too abundantly sustained to need argument. *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *State v. Tucker*, 38 Iowa, 496. Nor can I find in defendants' petition for removal that this is denied. On the contrary, they seem to confine themselves to laws subsequently passed. This amendment withdrew from defendant E. Walruff, and from all persons soever, the substantial portion of any privilege they may previously have possessed, not only as to sale, but as to manufacture. I say a substantial portion, and I think it proper for this court to take cognizance of this fact: that the amendment withdrew by far the most valuable part of the privilege previously extended defendants. This is a matter of common knowledge, easily susceptible of proof. At any rate, this court must recognize the fact that it withdrew some portion of the privilege. Here, then, E. Walruff must have sustained the greater part of the pecuniary loss, if any, of which she complains; certainly some portion of that loss. Defendants will urge that this law prohibiting the sale of liquors depreciated the value of their brewery; that to depreciate the value of property is to "deprive" de-

defendants of it within the meaning of the fourteenth amendment. Undoubtedly, diminution of the value of this brewery proceeds *pari passu* with restriction upon the privilege to sell liquors brewed. But the right to prohibit sales of liquors is established beyond question. The same state decision which declared the amendment constitutional, declared that the manufacture and sale for the excepted purposes were still subject to the limitations and conditions previously thrown around them. The court say:

"Before the amendment, and under the dram-shop act, the licensed dealer might sell to adults not habitual drunkards, upon secular days not devoted to special purposes. Under the amendment such licensed dealer may still sell, but only for certain purposes. The right to sell remains. The conditions of license continue." *Prohibitory Amendment Cases*, 24 Kan. 723.

So that, at this time, the state of the law was such that this defendant could neither manufacture nor sell intoxicating liquors except for certain purposes; and, to *sell* for these purposes, he must have a license, and the obtaining of this license was still as uncertain and contingent as at the time defendant made her investment. This state of the law was constitutional, both upon authority and the admission of this petition. The law had very much restricted the sale, and, both by express enactment and inevitable natural consequence, the manufacture, of intoxicating liquors; and still no constitutional right of defendant had been violated. The inevitable conclusion, then, must be that defendant E. Walruff had acquired (1) no vested right to sell intoxicating liquors; (2) no vested right to manufacture intoxicating liquors for sale.

The withdrawal of the right to sell withdraws necessarily all there is of value in the privilege to manufacture for sale. The privilege to manufacture and sell for the excepted purposes still remained, but conditional and defeasible, as before.

In 1881 the legislature enacted a law, in pursuance of the amendment, altering the restrictions already existing as to sale for the excepted purposes. The privilege before had depended upon the arbitrary decision of the residents of the community. It was now made a subject of *quasi* judicial inquiry. The effect of this law is set forth in *State v. Mugler*, 29 Kan. 252, the facts in which I need not recite. The effect of that law is settled by the construction there laid down. This court is bound by the construction put upon that law by that court. If, with that construction, the law does not conflict with the laws or constitution of the United States, that law must be held constitutional by this court. This court cannot say: "That state law, as construed by the state court, was constitutional; but we prefer to put a different construction upon it, which will make it unconstitutional." The opinion in that case contains the following words:

"In 1877, when the defendant erected his brewery, he had a right to manufacture all the beer or other intoxicating liquor which he chose; and he can do so still, provided he first obtains a permit therefor from the probate judge; and he can easily obtain the permit by complying with the terms and condi-

tions upon which permits are issued. At that time he could manufacture intoxicating liquors for any purpose which he chose; but since the adoption of the constitutional amendment, in November, 1880, he can manufacture such liquors only for medicinal, scientific, and mechanical purposes. His right to sell intoxicating liquors, however, has always been restricted."

It certainly seems clear that the right to manufacture for sale, without the right to sell, is a barren, useless right, the withdrawal of which cannot be considered a pecuniary loss. Does this law do violence to the constitutional right of the defendant? Under the law as it stood prior to this act, defendant could *manufacture* intoxicating liquors for medicinal, scientific, and mechanical purposes, perhaps without a license, so far as the letter of the law went, but he could not *sell* without a license; so that the inevitable result was that he could not manufacture without a license. This law of 1881 simply changed the method of obtaining a permit to sell, and provided *expressly* that the privilege to manufacture was conditional. Such is the construction put upon a state law by the supreme court of this state. Is it, thus construed, hostile to any constitutional rights of these defendants? All that this law of 1881 has done is to provide expressly that the defendant, in order to manufacture for medicinal, scientific, and mechanical purposes, must have a permit. This restriction existed *de facto* before the law of 1881 was passed. The law of 1885 does not affect the primary rights or privileges of defendants under the law of 1881. It simply supplied additional remedies for the enforcement of the law. These remedies are not new to the law, though the application of them to this particular class of cases may be new.

On the twenty-seventh day of August, 1883, as appears from the petition of removal, E. Walruff, her husband joining her, sold the premises on which the brewery in question stands, together with other property, to August F. Walruff and Fritz Iseman, for the sum of \$80,000, \$24,000 of which appears to have been paid in cash. The sale was by a bond for a deed. We conceive, therefore, that the title to this property is no longer in E. Walruff, but in defendants August F. Walruff and Fritz Iseman. E. Walruff has her right of action against these defendants, and the debt due her is secured by a lien on this and other property.

Such is a chronological statement of the facts set forth in the record, and of the laws enacted from time to time applicable to those facts. It is not perfectly clear what particular law or portion of a law defendants challenge. We shall therefore argue the whole series of laws, at the same time urging upon the court that the petition for removal raises a question only as to the amendments of 1885.

Now, in what way do any of these enactments of the state of Kansas, as applied to these facts, conflict with the federal constitution? The fourth and fifth amendments are exclusively restrictions on the powers of the federal government, its legislature and processes. *Latimer v. Borden*, 7 How. 66; *Smith v. Maryland*, 1 How. 77; *Green*



v. *Biddle*, 3 Wheat. 88; *Payne v. Baldwin*, 3 Smedes & M. 673; *Moore v. Coxe*, 10 Wkly. Notes Cas. 135; *Desty*, Fed. Const. 258, with cases there cited; also page 320 same work; *King v. Wilson*, 1 Dill. 555. We do not deem it necessary to argue this point. It is too well settled.

The provisions of the fourteenth amendment upon which defendants rely are these:

"(1) No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; (2) nor deprive any person of life, liberty, or property without due process of law; (3) nor deny any person within its jurisdiction the equal protection of the laws."

This amendment was fully construed in the *Slaughter-House Cases*, 16 Wall. 36. The legislative act which gave rise to these well-known cases contained the following among other provisions: After granting to a certain corporation the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the provisions of the act, it says:

"All other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep, and goats, the meat of which is determined for sale, within the parishes aforesaid, under a penalty of \$100 for each and every offense, recoverable, with costs of suit, before any court of competent jurisdiction; that all animals to be slaughtered, the meat whereof is determined for sale in the parishes of Orleans and Jefferson, must be slaughtered in the slaughter-houses erected by the said company or corporation."

The three parishes affected by this act contained 1,154 square miles, and before the passage of the act referred to about 1,000 persons were employed in the business of procuring, preparing, and selling animal food, and had capital invested in buildings, fixtures, and machinery adapted to the slaughtering business, and of small value for any other purposes. In the opinion of the court, delivered by Mr. Justice MILLER, there are laid down the grounds upon which it was urged that this law was in conflict with the constitution of the United States:

"The plaintiffs in error allege that the statute is a violation of the constitution of the United States, in these several particulars: that it creates an involuntary servitude forbidden by the thirteenth amendment; that it abridges the privileges and immunities of the citizens of the United States; that it denies to the plaintiffs the equal protection of the law; and that it deprives them of their property without due process of law,—contrary to the first section of the fourteenth article of amendment."

"Privileges and immunities." What privileges and immunities were intended to be protected by the second clause of the fourteenth amendment are thus defined, and for the purpose of this argument settled, in the *Slaughter-House Cases*. It is expressly held that "the second clause protects, from the hostile legislation of the states, the privileges and immunities of citizens of the United States, as dis-

tinguished from the privileges and immunities of citizens of the states. These latter, as defined by Justice WASHINGTON, in *Corfield v. Coryell*, 4 Wash. 371, and by this court in *Ward v. Maryland*, 12 Wall. 419, embrace generally those fundamental rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the federal constitution, under the care of the state governments, and of this class are those set up by plaintiffs.

In *Bartemeyer v. State*, 18 Wall. 129, the court say:

"The most liberal advocates of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on state laws for their recognition, are now placed under the protection of the federal government, and are secured by the federal constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent state legislatures from regulating and even prohibiting the traffic in intoxicating drinks, *with a solitary exception*. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, *absolutely prohibiting its sale*, as to amount to depriving the owner of his property. A single case, that of *Wynehamer v. People*, 13 N. Y. 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a state, or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-House Cases*."

This opinion was delivered by Judge MILLER. It is to be noticed that the court goes out of its way to note the "solitary exception." In one solitary case may the constitutionality of prohibitory laws be questioned. That exception is quite fully discussed. Justice FIELD, in a concurring opinion, says:

"I have no doubt of the power of the state to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. An act which declares that the owner shall neither sell nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law."

"Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." The opinion in the *Slaughter-House Cases* thus construes this provision:

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly-emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. If, however, the states did not conform their laws to its requirements, then, by the fifth section of the article of the amendment, congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state, not directed by way of discrimination against the negroes as a class, or on account of their race,

will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other."

It does not appear from the petition, but we presume the argument will develop the fact, that defendants really rely on this section of that amendment: "Nor shall any state deprive any person of life, liberty, or property without due process of law." (1) Are defendants deprived of property? (2) If so, is it without due process of law? The idea of property has two aspects: Objectively considered, it is the tangible, physical thing; subjectively considered, it is the right of the individual in regard to that thing. Generally speaking, this right combines two elements: (1) The right to sell; (2) the right to use. The property right may be (1) defeasible; (2) indefeasible. And this may be so, either by act of law, or by act of the parties.

This section can, of course, only be raised in behalf of defendant E. Walruff. John Walruff never owned the property in question, and Fritz Iseman and August Walruff bought it after its use as a brewery had become illegal. Neither do we think that E. Walruff can claim that she is being deprived of her property by the prohibition laws, except as they may be said to reduce the value of the security upon which she may rely for the payment of the debt due her from Iseman and August Walruff. It is not claimed that defendant is deprived of her property in the objective sense. She is not deprived of the tangible, physical thing. It is not claimed that defendant is deprived of her property, subjectively considered, so far as the right to sell it is concerned. It is not claimed that defendant is deprived of her property by being deprived of its use generally. The only claim is that defendant has been deprived of one particular use.

(1) Has defendant been deprived of a particular use which was ever indefeasibly hers? (2) If so, does such restriction upon the use amount to a deprivation of property within the meaning of the constitution? At the time this brewery was erected, the right to sell was a defeasible right; or, rather, defendant had a mere privilege to sell. The state had reserved the right to withdraw this privilege at any time. 29 Kan. 252. The right to manufacture for sale was therefore defeasible, because (1) a state, in the enactment of law, generally contemplates the existence of no other sovereignty than itself. Thus, the supreme court, in *Bartemeyer v. Iowa*, 18 Wall. 129, intimates that an enactment in that state prohibiting sale takes away all right to sell, notwithstanding there are many other markets for liquor outside that state. (2) The supreme court, in *Beer Co. v. Massachusetts*, 97 U. S. 32, says: "The right to manufacture includes the incidental right to dispose of the liquors manufactured." To take away the right to sell is to take away, *de facto*, the right to manufacture for sale. We conclude, therefore, that the right of defendants to manufacture for sale was a defeasible, conditional right, as was the right to sell, subject at all times to be withdrawn. Accordingly,

defendant has not been deprived in that respect of any use ever indefeasibly hers. Before the enactment of the amendment, defendant had the privilege to use her property (1) in the manufacture of liquors for sale as a beverage; (2) in the manufacture of liquors for sale for medicinal, mechanical, and scientific purposes; (3) in the manufacture of liquors for her own use. After the enactment of the amendment, she had the privilege to use her property only (1) in the manufacture of liquors for sale for medicinal, mechanical, and scientific purposes; (2) in the manufacture of liquors for her own use. And the first of these privileges was still defeasible. She had lost the use of her property for the manufacture of liquors for sale as a beverage; and this would have been so had the *express* prohibition been merely on the *sale*. Can the court say that the privilege to sell had been taken away constitutionally, but that the privilege to manufacture remained,—the *express* prohibition of the manufacture being unconstitutional,—when the supreme court says that the right to manufacture includes the right to sell? But if the court shall hold that defendant has been deprived of a particular use of her property which was once indefeasibly hers, does such restriction upon the use amount to a deprivation of property, within the meaning of the constitution? The legislative act complained of in the *Slaughter-House Cases* contained the following provision:

“All other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep, and goats therein, under a penalty of one hundred dollars for each and every offense.”

In delivering the opinion of the court, Justice MILLER said:

“The plaintiffs in error allege that the statute is a violation of the constitution of the United States in these several particulars: ‘\* \* \* That it deprives them of their property without due process of law.’”

And further on he says:

“We are not without judicial determination, both state and national, of the meaning of this clause, and it is sufficient to say that, under no construction of that provision that we have ever seen, or in any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.”

We submit that, to prohibit a man from using his stock-landing and his slaughter-house or packing-house for the purposes for which they were specially designed, deprives him of that property to just as great a degree as to prohibit a man from using his brewery for the manufacture of liquors for sale. In *Boston Beer Co. v. State*, 97 U. S. 25, it was decided in 1877 that all rights are held subject to the police power of a state; that if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may suffer inconvenience; that, as the police power of a state extends to the protection of the lives, health, and property

of her citizens, the maintenance of good order, and the preservation of public morals, the legislature cannot by any contract divest itself of the power to provide for these objects. And the court, reaffirming its decision in the Iowa case, held that, as a measure of police regulation, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States. All the justices concurred in this decision. This case was a proceeding for the forfeiture of certain malt liquors belonging to the Boston Beer Company, which had been seized while being transported to the place of business of the company for purposes of sale, in violation of an act of the legislature commonly known as the "Prohibitory Liquor Law." This company had been engaged in the manufacture of malt liquors for 60 years at the time the prohibitory liquor law was passed, and had been specially chartered for that purpose by the state. It must be presumed to have made large investments in buildings and machinery adapted to the purposes for which the company was incorporated. Yet Mr. Justice BRADLEY, in delivering the opinion of the court in that case, says:

"The plaintiff in error was incorporated for the purpose of manufacturing malt liquors in their varieties, it is true; and the right to manufacture undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But, although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer."

It is to be particularly noticed, in regard to this case, that the beer company had acquired, not only all rights which the citizen ordinarily acquires by investments in a business legitimate at the time of the investment, but these rights had apparently been added to by express grant.

Now, suppose we compare the *Slaughter-House Cases* with this case. In the *Slaughter-House Cases* the record showed that, prior to the legislative act complained of, a thousand men were engaged in slaughtering and preparing animals for food, and had money invested in buildings and fixtures adapted to those purposes. Upon the business in which they were engaged, and in which their money was invested, there were no legal limitations or restrictions soever, and no intimation of any. In this case the defendant was engaged in a business and had her money invested in a business which was, at the time of her investment, barely tolerated by the law. She knew at the time she made her investment that the laws of this state were such that the right to sell might be withdrawn at any time, and she be rendered powerless to proceed with the manufacture. She had every reason

to believe that she had only a contingent, temporary, defeasible privilege to conduct her business, and make use of her property therein. They certainly had some reason to believe that they had an absolute, perpetual, and unconditional right to engage in and continue in their business, and make use of their property therein. In those cases the act of the legislature took away all right to use buildings and fixtures for the purposes for which they were intended. In this case the act of the legislature still allowed defendant to use her property for the manufacture of liquors for medical, mechanical, and scientific purposes, provided she could satisfy the probate judge that she was a proper party to receive a permit. In those cases the privileges taken away were conferred upon a monopoly, according to the opinion of a minority of the court. In this case there is no claim that a monopoly has been created. In those cases the legislative enactment provided *expressly* that certain buildings and fixtures should not be longer used for the purposes for which they were designed. The enactment in this case falls far short of that. Can this law be held to deprive defendant of property without due process of law, when that did not? We maintain that the laws complained of here are wholly within the police power of the state.

Judge DILLON, in his work on Municipal Corporations, (page 136,) says:

"But it may here be observed that every citizen holds his property subject to the proper exercise of this power; \* \* \* and it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally. \* \* \* It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner. \* \* \* That, among these police powers, is the right of the state to regulate, prohibit, and suppress the liquor traffic, has not been doubted in this country since the *License Cases* of 5 How. 504."

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state." *Beer Co. v. Massachusetts*, 97 U. S. 25.

The whole question in this case is as to the boundaries of the police power of a state. It has never been intimated that the state cannot prohibit the sale of intoxicating liquors. The supreme court has indicated the sole instance where such prohibition might raise a constitutional question. It is clear that such a law is constitutional as to sellers who have property invested in fixtures adapted to such selling; and, if so, is it not constitutional as to those who have property invested in fixtures for the manufacture? If defendant in this case was deprived of her property without due process of law, then every

person who has engaged in the selling of liquors at the time of the passage of the amendment, and who had money invested in fixtures adapted to that purpose, has been deprived of property without due process of law. But defendants seek to draw this distinction between the prohibition of the sale and the prohibition of the manufacture in this state. They allege that, before the enactment of the amendment, though the right to sell was limited and restricted, the right to manufacture was not. We maintain that, so far as the vesting of any right to sell or to manufacture, the two are on the same footing; that, so far as *vested rights* are concerned, any restriction upon sale was a restriction upon manufacture, by inference and construction. Defendants will deny this. Defendants come here, and claim that because a law restrains defendant in one particular in the use of her property, that by construction or inference that law deprives her of that property; but at the same time they deny that the prohibition of the sale of an article, or the restriction of such sale, can, by any construction or inference, be deemed a prohibition or restriction of the manufacture for sale. The whole of defendant's loss here alleged lies in the loss of the privilege to manufacture for sale, and her privilege to sell was always uncertain and defeasible.

But let us go further, and admit, for the sake of argument, that, before the amendment, defendant's right to manufacture was not restricted, either expressly or inferentially. What then? The privilege of plaintiffs in the *Slaughter-House Cases* was not restricted either expressly or inferentially. The record in the *Bartemeyer Case* does not show that the right to sell was restricted at the time Bartemeyer first invested in the fixtures of the business and embarked in the trade. And it is to be observed that in the opinion in this case the constitutionality of the prohibitory laws is not *denied* under any circumstances, and it is doubted only as to *one* extreme case, namely, where the law actually prohibits the sale of an article which it was proper to sell (and which was owned) before the law was passed. That case is expressly denominated the sole case where a doubt would arise. We say, therefore, that the questions attempted to be raised here are no longer questions. The controversy, and the only controversy, here is as to the extent of the police power to restrict the use of property; and that identical question, as it arises here, was settled in the *Slaughter-House Cases*. Accordingly, it seems clear in this case that the state has not deprived defendant of her property, but has merely restricted one of the two rights which together constitute the right of property, and that the state in the beginning reserved the power to make that restriction. But supposing defendant to be deprived of her property within the meaning of the constitution, is it without due process of law? The phrase "due process of law" is probably identical, or nearly identical, with the phrase "law of the land." In the *Dartmouth College Case*, 4 Wheat. 518, Webster defines the latter phrase thus: "By the law of the land is meant the general law,

which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial." The meaning is that every citizen holds his life, liberty, and property and immunities under the protection of the general laws which govern society. Can the law complained of by defendants be said to condemn without hearing, to proceed without an inquiry, and to render judgment without trial? It seems to us not.

It is urged that the act of 1885 is in contravention of section 1 of article 14 of the constitution of the United States; that the enforcement of said act in the proceedings instituted by plaintiff herein will deprive defendants of their property without due process of law, and abridge their privileges and immunities by not granting them a trial by jury. If the prayer of plaintiff's petition herein should be granted, would it be a taking of property within the meaning of the fourteenth amendment? and, if so, would it be a taking without "due process of law," in violation of said amendment, or abridge the privileges or immunities of defendants by not giving them a jury trial? We claim not. It must be conceded that if this is an action commenced or continued according to the due course of legal proceedings, and according to those rules and forms which have been established for the protection of private rights, it is "due process of law," and is not in violation of any part of the fourteenth amendment. *Kennard v. Louisiana*, 92 U. S. 481. When the statute makes ample provision for judicial inquiry, it is "due process of law." *Pearson v. Yewdall*, 95 U. S. 294.

In the case of *Murry v. Hoboken Land & Imp. Co.*, 18 How. 276, the court thus defines "due process of law:—"

"For though 'due process of law' generally includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, \* \* \* yet this is not universally true."

"Due process of law" does not mean judicial process. *McMillin v. Anderson*, 95 U. S. 37, 42. "Due process of law" includes summary process. 18 How. 276.

In the case of *Walker v. Sauvinet*, 92 U. S. 92, 93, the court say:

"So far as we can discern from the record, the only federal question decided by either one of the courts below was that with relation to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insists that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right. \* \* \* The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of natural citizenship which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings."



The case of *Kennard v. Louisiana*, 92 U. S. 480, was a proceeding to remove Kennard from office. This was commenced by rule to show cause why he would not surrender his office. Service was had, time given to answer, an opportunity to be heard, and this was held to be due process of law. On page 483, the court say:

"Upon this, [the return of the rule,] he asked a trial by jury. This the court refused, and properly, because the law under which the proceedings were had provided in terms that there should be no such trial. He then went to trial. \* \* \* From this it appears that ample provision had been made for the trial of the contestation before a court of competent jurisdiction, for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet, for giving him an opportunity to be heard in his defense, for the deliberation and judgment of the court, for an appeal from this judgment to the highest court of the state, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction, in accordance with the rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which proceedings were originally instituted, and upon his appeal in the highest court of the state."

After a careful consideration of the authorities above cited, and the case of *Littleton v. Fritz*, 22 N. W. Rep. 641, we are satisfied that they answer all the constitutional objections urged by defendants against this proceeding,

This is a suit commenced as all other civil suits are commenced in the courts of this state,—the same service of process, time for answer, appearance, defense, trial, deliberation, and judgment as allowed in all civil cases,—nothing peculiar about it. Neither does it differ in any particular whatever from other cases of like character. By this action the state does not seek to take the property of the defendants. It is simply a proceeding to restrain or stay the defendants from using their property for illegal purposes,—to prevent them from violating the laws of the state. We fail to discover anything in this case which gives this court jurisdiction. It seems quite clear to us that jurisdiction of this case would not have been entertained by this court if it had been originally commenced here.

Judge McCravy of this circuit, in the case of *Long v. Laclede Bank*, 18 Fed. Rep. 193, held "that these two sections [act 1875] are to be regarded as *in pari materia*, and that the second section could not be construed to confer upon the circuit court jurisdiction in a case in which it would not have jurisdiction under the first section; that if a party could not originally sue in that court, he could not come into it through the state court."

In the case of *Virginia v. Rives*, 100 U. S. 337, Judge FIELD says:

"If it [the federal court] could not have jurisdiction at the first, it cannot upon a removal of the prosecution to it. \* \* \* The removal is only an indirect mode by which the federal court acquires original jurisdiction."

If the effect of this proceeding was to take property without due process of law, it would yet be a matter within the control of the state courts, and not such a violation of the fourteenth amendment as to call for judicial action of the federal courts."

We have only one further question to present, and this we shall not argue, but are content merely to raise it and submit authorities upon it. Does the matter in dispute exceed, exclusive of costs, the sum or value of five hundred dollars? *Barry v. Mercein*, 5 How. 103, 119, 120; *Pratt v. Fitzhugh*, 1 Black, 271, 273; *De Kraft v. Barney*, 2 Black, 704; *Lownsdale v. Parrish*, 21 How. 290; *Sparrow v. Strong*, 3 Wall. 97, 103, 104; *Potts v. Chumaseo*, 92 U. S. 358, 361; *Youngstown Bank v. Hughes*, 106 U. S. 523; S. C. 1 Sup. Ct. Rep. 489.

We ask that the motion be sustained, and the case remanded.

*Samuel A. Riggs and W. W. Nevison*, for defendants.

BREWER, J. The facts upon which the foundation question in this case rests are few and simple. Between 1870 and 1874 the defendants constructed a brewery in Lawrence, Kansas. The building, machinery, and fixtures were designed and adapted for the making of beer and for nothing else. For such purpose they are worth \$50,000; for any other use not to exceed \$5,000. At the time of the erection of the building, and up to 1880, the making of beer was as legal, as free from tax, license, or other restriction, as the milling of flour. In that year a constitutional amendment was adopted, prohibiting the manufacture of beer except for medicinal, scientific, and mechanical purposes. In 1881 and 1885 laws were enacted to carry this prohibition into effect. Under these laws a permit was essential for the manufacture for the excepted purposes. To the defendants this permit was refused. An injunction was thereupon sued out from the district court enjoining defendants absolutely from the manufacture of beer. Thus, in strict conformity to the laws of the state, the defendants are prohibited from using their property for the purposes for which alone it is designed, adapted, and valuable, and are required, without compensation, to surrender \$45,000 of value which they had acquired under every solemn unlimited guaranty of protection to property which constitutional declaration and the underlying thought of just and stable government could give. The action in which this injunction was granted they now seek to remove to this court, and insist that, no matter what the state may think or do, the fourteenth amendment to the federal constitution does give protection, or, at least, that they are entitled to the opinion and judgment of the federal courts upon the question whether that portion of the fourteenth amendment which forbids a state to "deprive any person of life, liberty, or property, without due process of law," and "to deny to any person within its jurisdiction the equal protection of the laws," is not violated by this action of the state as respects them.

It is idle to deny that the question here presented is one of diffi-

culty and grave importance. On the one hand, it is insisted that both the amendment and the laws were duly, and in compliance with established forms of procedure, adopted and enacted; that the withholding of the permit was the act of a judicial officer in the exercise of a proper and granted discretion; that the injunction was issued out of the regular court of general original jurisdiction, and in an ordinary and familiar form of action; that thus there has been "due process of law;" and that the amendment does not prohibit a state from depriving a person of his property, but only prohibits such deprivation "without due process of law." While, on the other hand, it is apparent that the defendants, having invested large properties in a perfectly legal business, are stripped of the value of such properties; and that, not as the indirect and consequential result of legislative changes in the law, but by a direct prohibition upon the only use for which such properties are designed, adapted, and valuable. Is a state potent, through the forms of law, to take from a citizen by direct action the value of his property without compensation?

As the judge of an inferior federal court, I turn naturally to the opinions of my superior, the supreme court of the United States, for information and guidance. In the case of *Bartemeyer v. Iowa*, 18 Wall. 129, the opinion of the court was delivered by Justice MILLER, and in it the court uses this language:

"But if it were true, and it were fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the state of Iowa first imposed an absolute prohibition on the sale of such liquors, then we can see that two very grave questions would arise, namely: Whether this would be a statute depriving him of his property without due process of law; and, *secondly*, whether, if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court."

In the same case, in a concurring opinion, Justice BRADLEY said:

"The law, therefore, was not an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good, they can be removed by awarding compensation to the owner."

And Justice FIELD adds these words:

"I have no doubt of the power of the state to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such articles, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any state the fourteenth amendment affords protection."

In the subsequent case of *Beer Co. v. Massachusetts*, 97 U. S. 25, the court thus refers to this matter:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by an incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without compensation; but we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa*, was not in existence when the liquor law of Massachusetts was passed."

In the light of this declaration of the supreme court, that when a man owns, with the unrestricted right to use or sell, a glass of liquor,—mere personal property which, without injury or depreciation in value, can be carried outside the jurisdiction of the state,—legislation of a state prohibiting its sale, and to that extent only diminishing its value, presents a grave question under the fourteenth amendment; the further positive assertion of one of the justices that such legislation is void under that amendment; and a still further intimation of the court in a later case that vested rights of property cannot be destroyed for the public good without compensation,—it would seem a contemptuous disregard by a subordinate tribunal of the judgments of its superior for me to hold that legislation of a state, destroying the value by prohibiting the use of property which cannot be moved, and in whose use the owner had prior thereto an absolute and unrestricted title, is clearly not in conflict with that amendment, and presents absolutely no question for the cognizance and judgment of the federal tribunals.

But I am not content to leave this case upon these authoritative suggestions of the supreme court. As a new matter, it is clear to me that there is a federal question giving right of removal. And here I assert these propositions:

*First.* Debarring a man, by express prohibition, from the use of his property for the sake of the public, is a taking of private property for public uses. It is the power to use, and not the mere title, which gives value to property. Give a man the fee-simple title to a flour-mill, coupled with an absolute prohibition on its use, and of what value is it to him? In the most common and ordinary case of taking private property for public uses,—the condemnation of the right of way for a railroad,—the title is not divested. The owner still retains the fee-simple, and he is only debarred from the use. When the railroad abandons the use, he retakes it. In the leading case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, which was a case where land was overflowed in consequence of the erection of a dam, the supreme court thus disposes of this matter:

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real

property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In the case of *Munn v. Illinois*, 94 U. S. 141, Mr. Justice FIELD uses this language:

"All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them, deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received."

I meet here the common argument that, when private property is taken for public use, there is always a transfer of the use from one party to another; that here the use is not transferred, but only forbidden; and that this deprivation of the use is only one of the consequential injuries resulting from a change of policy on the part of the state for which no compensation or redress is allowed. It is *damnum absque injuria*. The argument is not sound. As a matter of fact, in condemnation cases, seldom is the particular use to which the property has been put transferred. Almost always that use is destroyed in order that another may be acquired. The farmer surrenders a part of his farm to the railroad company, not that the company may continue its use for farming purposes, but that the public may acquire the benefit in another direction. So, where land is flowed by a mill-dam. And thus is it generally. Here the use is taken away solely and directly for the benefit of the public. For no other reason, and upon no other ground, could it be disturbed. Of course, in this, as in other cases, some use remains to the owner; but here, as elsewhere, the use which is of special value is taken from him for the benefit of the public; and this is not a consequential, but a direct result. It is not that the profits of his manufacture are reduced by reason of a prohibition upon sales. The law speaks to him by direct command, and says, "Stop your manufacturing." It is idle to talk of consequential results and injuries when the law, in direct language, forbids the use of the premises for a brewery.

I assert, *secondly*, that natural equity, as well as constitutional guaranty, forbids such a taking of private property for the public good without compensation. In the case of *State v. Mugler*, 29 Kan. 252, this question was presented to the supreme court of Kansas, and, as a member of that court, I then expressed the same opinion. I am aware that my brethren differed with me, and that the court held that the state constitution carried no such prohibition. In view of that decision I shall have little to say in respect to the guaranties in

the state constitution. I may, however, be permitted to say, and I do it with the highest respect for the members of that court, and with the utmost deference to its opinions and judgments, that in the light of the frequent discussions of the question since that decision, and the more I have reflected thereon, the more profoundly am I convinced that the guaranties of safety and protection to private property contained within our state constitution forbid that any man should be thus despoiled of that which gives value to his property for the sake of the public good, without first receiving compensation for that which is taken from him.

Turning to the opinions of other courts, I find strong indorsement of the proposition I have asserted. In the case of *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, the court says:

"We are unwilling to concede the existence of an indefinable power, superior to the constitution, that may be invoked whenever the legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use without compensation, whether such property consists of franchises or tangible forms of property."

The constitution of New Jersey contains no such guaranty as ours, yet the supreme court of that state, in *Sinnickson v. Johnson*, 17 N. J. Law, 129, declares "that this power to take private property reaches back of all constitutional provision, and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

The constitution of New York was similarly deficient, and yet, in *Gardner v. Newburgh*, 2 Johns. Ch. 162, Chancellor KENT granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. After citing several continental jurists on this right of eminent domain, he says that, while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified; and he adds that the principles and practice of the English government are equally explicit on this point.

Were similar action taken by the state in respect to other industries, I can but think the vigor of constitutional guaranties would seem clearer. In my own city is a large manufacturing establishment, in which hundreds of thousands of dollars have been invested for the making of glucose. This is an inferior kind of sugar, and in the opinion of some a deleterious article. Yet the industry is legal, the manufacture not forbidden. Suppose the next legislature should

believe that glucose was injurious to the public health, and forbid its manufacture, could the wheels of that manufactory be stayed, and the value of that investment be destroyed, without compensation? Take, also, the illustration of playing cards, which, by reason of their use for gambling purposes, are, in the judgment of many good people, a bane to society. If a factory for their manufacture was established, when, as now, a perfectly legal industry, would the owner hold his investment subject to the opinions of perhaps a temporary majority? Or, take a still stronger illustration. This is a corn-growing state, yet wheat also is raised abundantly, and many flour-mills exist. Suppose the legislature should determine that the best interests of the state would be promoted by stopping the growing of wheat, and increasing the crop of corn, and to that end should prohibit the milling of flour, must the owners, without compensation, abandon their milling and sacrifice their investment? Does not natural justice, as well as constitutional guaranty, compel compensation as a condition to such sacrifice? Yet who can state what the law will recognize as a legal distinction between those cases and this. Of course, it will be said that no legislature would ever think of such extreme and unreasonable action. But the question for courts to determine is not what is likely to be done, but what can be done.

*Thirdly.* I affirm that, no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not "due process of law" if the plain purpose and inevitable result is the spoliation of private property for the benefit of the public without compensation. It is a mistake to say that the forms of law alone constitute "due process." No complete and perfect definition of the phrase "due process of law" has yet been given. The most familiar, and one for ordinary cases sufficiently accurate, is that given by Daniel Webster in the celebrated *Dartmouth College Case*,—the "law of the land" being substantially equivalent to "due process of law,"—as follows: "By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial." But, as said by Mr. Justice MILLER in *Davidson v. New Orleans*, 96 U. S. 104, it is probably better "to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." In the same case Mr. Justice BRADLEY adds these words:

"In judging what is 'due process of law,' respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

In *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 276, the supreme court thus limits the meaning of the phrase:

"The constitution contains no description of these processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."

Now, in the case at bar, while judicial proceedings are prescribed, yet the spoliation is the direct command of the legislature, and the judicial proceedings are only the machinery to execute that command. No discretion is left to the courts. The legislature has in terms said to defendants, "Stop your use of your brewery," and has directed the courts to enforce that command. There is nothing but mere machinery between the legislative edict and an unused valueless manufacture. As well might the executive as the courts be charged with the enforcement of this command. Such a command, no matter how enforced, operative to deprive a citizen of the value of his property without compensation, is, in the language of Mr. Justice BRADLEY, *supra*, "arbitrary, oppressive, and unjust," and therefore should be "declared to be not due process of law."

*Fourthly*, and as a necessary consequence of the preceding. Legislation which operates upon the defendants as does this is in conflict with the fourteenth amendment, and, as to them, void. At least, it presents a question arising under such amendment, as to which they are entitled to the opinion and judgment of the federal courts. As the amount in controversy is unquestionably in excess of \$500, the case is a removable one.

In view of what has hitherto fallen from my pen in other cases, it may be unnecessary to add anything further; yet, to guard against any possible misapprehension, as well as to indicate that my views as expressed upon other questions have not changed, let me say that I do not in the least question the power of the state to absolutely prohibit the manufacture of beer, or doubt that such prohibition is potential as against any one proposing in the future to engage in such manufacture. Any one thus engaging does so at his peril, and cannot invoke the protection of the fourteenth amendment, or demand the consideration and judgment of the federal courts. All that I hold is that "property," within the meaning of that amendment, includes both the title and the right to use; that, when the right to use in a given way is vested in a citizen, it cannot be taken from him for the public good without compensation. Beyond any doubt, the state can prohibit defendants from continuing their business of brewing, but before it can do so it must pay the value of the property destroyed.

Nothing that I have said in this opinion is to be taken as bearing on the question of the sale of beer, or the power of the state over that. Counsel claimed that the right to manufacture, without the right to sell, was a barren right. Whatever limitations may exist in this state,



the markets of the world are open, and, with such markets, the right to manufacture is far from a barren right.

Other questions were discussed by counsel at great length and with great ability. I have not noticed them in this opinion, already quite lengthy, because this question is in the case, cannot be ignored, and justifies a removal.

The motion to remand will be overruled.

One thing more I may be excused for referring to. In the course of the various arguments that have been made to me in this state, and the sister state of Iowa, on the question of removals to the federal courts of proceedings to enforce their prohibitory laws, it has more than once been intimated that jurisdiction in the federal courts of such proceedings meant the nullification of those laws. There could be no greater mistake. The judges of those courts are citizens of these states,—as interested as any citizens in the good name of their states, the enforcement of their laws, and the sobriety of their citizens. Experience has shown that those courts enforce laws as strictly, as any, are as little disposed to tolerate trifling or evasion of their orders, and generally punish with a severer hand. If it should so happen that, by the judgment of the supreme court of the United States,—the ultimate tribunal in this nation,—it should be determined that in this or any kindred case the zeal for temperance of the good people of this state has led them to infringe upon sacred and protected rights of property, I cannot doubt that they will gladly hasten to make that compensation which shall be found just. Indeed, it is a truth ever to be borne in mind, and never more so than in times of deep feeling and determined effort, that they who are striving to lift society up to the plane of a higher and purer life should see to it that every act and every step is attended by absolute justice. I commend this to the thoughtful consideration and judgment of the good people of my state,—a state in whose past I glory, and in whose future I believe.

#### NOTE.

In *Weil v. Calhoun*, 25 Fed. Rep. 865, a bill was filed in the United States circuit court for the Northern district of Georgia, for the purpose of testing the Georgia local option and prohibition law. The plaintiffs alleged, among other things, that the act was unconstitutional, because it would render wholly worthless the stock, fixtures, etc., of the brewery, and seriously interfere with the property, business, and vested interests of the complainants. The court say:

"The great complaint of this bill is that by this law the complainants are deprived of their property, and injured in their business, etc. Nothing is better settled, by a large number of decisions of the supreme court of the United States, than that such losses and such damages are not a good objection to a law. The states must have power to legislate for purposes of good order, the preservation of the public health, and a thousand other objects, and it is an every-day event that some man's property is made less valuable—perhaps worthless—by the operation of laws passed by the legislature for the public good. Professions in which men make money, and devote their whole time, are declared illegal, and are broken up and destroyed, very much to the hurt and pecuniary loss of the persons concerned, and they have no redress. I allude now to the profession of the gambler. So, too, so vastly profitable a business as a lottery, even though protected by a legislative grant, has been broken up by a law prohibiting its exercise, and its property and business dissipated to the winds without any remedy. So, of the oleomargarine manufactory; and so of a hundred different investments, made

under laws not prohibiting them, yet rendered valueless or far less valuable by means of the operation of laws passed by the legislature for the public good, as it supposed. This whole subject of the liquor traffic, and investments precisely like those of the complainants broken up or largely crippled by prohibitory laws, has been a fruitful source of discussion before the courts, and they are all now agreed that such rights and properties as the complainants assert they are about to have injured or destroyed if this law be declared of force are not protected by the constitution of the United States. *Passenger Cases*, 7 How. 504; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Slaughter-House Cases*, 16 Wall. 129; *Stone v. Mississippi*, 101 U. S. 814. This question has been before the supreme court of the United States, the court of the last resort in cases of this kind and that court uniformly and clearly held that rights of the character here set up must yield, however costly and devastating may be the evil, to the will of the legislature in its passage of laws in their judgment for the public good. It is one of the risks that every man takes in entering a business or making an investment, and he cannot complain."

### HILTON v. OTOE CO. NAT. BANK and others.

(Circuit Court, D. Nebraska. January 26, 1886.)

#### 1. UNEXECUTED MORTGAGE—FORECLOSURE—PERSONAL JUDGMENT.

In the absence of express prohibition, there is no reason why a personal judgment may not be rendered against a debtor in an action in which a mortgage not executed by the debtor is foreclosed.

#### 2. EXECUTION SALE—CONFIRMATION—ACTION TO CANCEL DEEDS AFTER SUBSEQUENT CONVEYANCES.

As confirmation is a final order, and conclusive upon the regularity of the proceedings in respect to the sale, and as the court had in the case at bar unquestioned jurisdiction of the person as well as the subject-matter, *quære* whether, if the proceedings were erroneous, the validity of the judgment, sale, and deed could be questioned in a collateral action to cancel subsequent deeds.

In Equity.

J. S. Gregory, for complainant.

Harwood & Ames, for defendant.

BREWER, J. On the first day of April, 1869, complainant was indebted to defendants on a promissory note dated October 14, 1868, for \$650, and an acceptance dated November 27, 1868, for \$531.07. On that day he transferred to the bank as collateral security a note and mortgage for \$1,500 executed by Augusta Hilton to himself. On March 8, 1870, these debts being unpaid, the bank brought suit. In the petition, the note and acceptance of complainant, and the note and mortgage of Augusta Hilton, were all set forth, and an assignment of the latter alleged. On April 27, 1871, complainant appeared in open court, and admitted his indebtedness. A personal judgment was rendered against him for over \$1,400, and a decree of foreclosure of the collateral mortgage. On June 13, 1872, an order of sale was issued, and the property described in the mortgage advertised for sale on October 26, 1872. On October 25th, in a suit brought by children of said complainant, a temporary injunction was granted restraining the sale. The order of sale was thereupon returned unexecuted. No relief was asked in the petition filed by the children as respects the personal judgment against complainant;

all that was sought was to restrain the sale of the mortgaged property. An answer was filed in this injunction suit by the bank, but no trial was ever had, and on the first day of November, 1873, the bank, by its attorney, consented that the injunction be made perpetual. On March 27, 1873, an execution was issued on the personal judgment against complainant, and levied on the land in controversy. Sale took place on May 17, 1873, and the bank purchased the land for \$924. On November 6, 1873, the sale was confirmed. No exceptions were taken to this confirmation, and the order thereof was never set aside. Subsequently the bank sold and conveyed the land, and its grantee also sold and conveyed to different parties. The complainant now files this bill, alleging that he is still the owner of the land, and praying to have these various deeds canceled as clouds upon his title.

He bases his action on two grounds: *First*. He alleges that the judgment was paid before the issue of execution. There is not a syllable of testimony to sustain this allegation. He never paid a dollar to the bank; and his testimony, that he is informed and believes that his son-in-law did, of course amounts to nothing. *Second*. He claims that, because in the original action a decree of foreclosure of a mortgage was sought and obtained, no execution could issue until after sale of the mortgaged premises, and then only for the deficiency for which personal judgment should be entered. Counsel cites section 847 of the Nebraska Code as authority for this, and says that no personal judgment was entered. He is mistaken as to the fact, and his law is inapplicable. The record shows that a personal judgment was rendered against complainant on his note and acceptance. Again, the mortgagor was not the principal debtor. The mortgage was not given to secure complainant's debt to the bank, but Augusta Hilton's debt to him. So, in the petition, two distinct causes of action against two different parties were presented: one a cause of action against him on his personal indebtedness to the bank in which the mortgagor was not interested, and the other against a mortgagor to foreclose a mortgage on property in which he had no title. Both causes passed into judgment and decree. So this case does not fall within the section above cited, or the case of *Clapp v. Maxwell*, 13 Neb. 542; S. C. 14 N. W. Rep. 653. In that case it was decided that a leading principle of title 27 of the Code, in which said section 847 is found, is "that, ordinarily, a mortgagor shall not be answerable for a secured debt upon the mortgage, and personally at the same time, and that one of these remedies having been selected, it must be exhausted before the other can be resorted to, unless first specially authorized by the court." Of course, that principle has no application here. There was no attempt to hold the mortgagor personally liable. In the absence of express prohibition I know of no reason why a personal judgment may not be rendered against a debtor in an action in which a mortgage not executed by the debtor is fore-

closed. Further, as confirmation is a final order, and conclusive upon the regularity of the proceedings in respect to the sale, (*Berkley v. Lamb*, 8 Neb. 398; S. C. 1 N. W. Rep. 320; *Taylor v. Courtney*, 15 Neb. 199; S. C. 16 N. W. Rep. 842,) and as the court had unquestioned jurisdiction of the person as well as the subject-matter, it may well be doubted whether, if the proceedings were erroneous, the validity of the judgment, sale, and deed could be questioned in this collateral manner.

The bill will be dismissed at the costs of the complainant.

### BOHANAN and others v. GILES and others.

(Circuit Court, D. Nebraska. January 25, 1886.)

1. SPECIFIC PERFORMANCE—CONTRACT OF ANCESTOR—CONSIDERATION—PAYMENT TO EXECUTRIX—RIGHT OF PURCHASER.

When all the right and title of children and their grantees were received from the father of such children, they took such right and title subject to his contracts; and if that father, or his executrix, have received full payment for any land sold by him, they should be required to surrender to such purchaser the legal title.

2. SAME — EQUITY — PROTECTION OF INFANTS CANNOT INCLUDE INJUSTICE TO OTHERS.

Equity will not, even in the interest of minors, be tenacious of technicalities, when thereby gross injustice will result.

In Equity.

*Brown Bros.*, for complainant.

*L. C. Burr* and *J. M. Woolworth*, for defendant.

BREWER, J. The facts in this case are few, and in the main undisputed, and the question a narrow one. In the spring of 1868 Jacob Dawson owned the lot in controversy. He made a written contract with George McKay by which he sold the lot to McKay for \$300, to be paid in mason work. Two hundred dollars of this was unquestionably paid during Dawson's life-time. He died July 22, 1869, leaving a will, by which he gave to his wife all his property, real and personal; "the same to be and remain hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow, upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike." The widow became executrix. She subsequently remarried. Possession of the entire lot was given to McKay in 1868. During Dawson's life portions of the lot were deeded by Dawson and wife to parties to whom McKay had sold; the legal title to the rest remaining in Dawson at the time of his death. Subsequently, and on January 3, 1870, Mrs. Dawson

deeded this remainder to McKay. Plaintiffs claim under McKay; defendants, under deeds from Dawson's children.

The question is whether McKay paid the remaining \$100 under such circumstances as to satisfy the contract above referred to. He did mason work, amounting to \$112, which, after Mr. Dawson's death, was accepted by Mrs. Dawson as done under the contract, and the surplus, \$12, paid to him, as well as the deed above mentioned executed. But this work was done in the erection of a house on real estate belonging to Mrs. Dawson. Before Mr. Dawson's death he had planned to build on this real estate, and had arranged with McKay to complete his payment for the lot by work on this building. Probably McKay had already done some of this work at the time of his death, though this is not certain. At any rate, the building was pushed ahead soon after his death, and completed the ensuing fall. Now, from these facts, it may be remarked that McKay paid the full contract price,—paid it in the manner directed by the owner of the lot. The fact that part of the price was paid in work on property not belonging to Dawson is immaterial; for, as the party entitled to receive payment, Dawson could direct where the work should be done. He might have ordered it done on a church, a public building, or on a neighbor's house; the place and the ownership of the property benefited was immaterial; so that if Dawson had lived till McKay had finished this job, he could not have pleaded in defense to an action by McKay for specific performance that part of the work was done on his wife's separate property.

But it may be said that Dawson's death revoked his directions to McKay. Assume that it did, and that there was no one to direct where the work should be done, still McKay's right to pay the balance of the purchase price, and obtain the benefit of his contract by securing title to the lot, was not gone. He could have paid in money, if not in work. And to whom should he have paid? Obviously, the executrix; and if she accepted the payment in work instead of money, who can question the effect of the payment? She and her bond are responsible for any misappropriation of personal effects of the testator. Doubtless, she dealt with McKay, accepted the work, and made the deed in the belief that she was the owner of the property. But will a court of equity permit a party to be deprived of the just results of his acts and labor, through a mere mistake of law respecting the forms of procedure, and the particular authority under which the adverse party assumes to act? All that equity in such a case insists upon is that full payment be made, and made to a party having the right to receive it. All the title or interest the children or their grantees have, they received from their father, and they took it subject to his contracts; and if that father or his executrix have received full payment for any lot sold by him, they should be required to surrender to such purchaser the legal title. It is true, the children were minors at the time of these transactions, and a court of equity takes

special care that the rights of minors are protected. Doubtless it will insist upon compliance with all, even technical, rules and forms, if thereby justice be done; but it will not, even in the interests of minors, be tenacious of technicalities when thereby gross injustice will result.

Let decree be entered for the plaintiffs as prayed for.

---

MULLEN *v.* WINE.

*Circuit Court, D. Colorado. January 18, 1886.*

PUBLIC LANDS—ADDITIONAL HOMESTEAD—ACT OF JUNE 8, 1872—RIGHT TO LOCATE AND ENTER PERSONAL PROPERTY—SALE BY GUARDIAN.

The right of the children of a deceased soldier to locate and enter 80 acres of public land as an additional homestead under the act of June 8, 1872, is personal property, and may be sold and assigned to a third party by their guardian.

In Equity.

*L. S. Dixon and Thomas & Thomas*, for complainant.

*J. F. Franke*, for defendant.

BREWER, J. My opinion in this case will be brief, because the character of the questions and the amount in controversy give, in addition to statements of counsel, assurance that the case will be taken to the supreme court for final decision. The pertinent facts for any opinion I express are these: Under the act of congress of date June 8, 1872, entitled "An act to amend 'An act relating to soldiers' and sailors' homesteads,'" Lucy Phillips and Hattie Phillips, minor children of William Phillips, deceased, were entitled to locate and enter 80 acres of public lands as an additional homestead. They resided in Minnesota, and their guardian sold this right, and received full pay therefor. Plaintiff claims under location and title made in pursuance of this sale. After the sale of this right, and the location and entry, (which was in the names of the minors,) defendant acquired his deed and title from them.

There are really but two questions in the case: *First*, was this right to locate and enter, personal property? *Second*, was it assignable? For that the guardian, under the laws of Minnesota, could, without any order of court, sell personal property belonging to his ward, is conceded. That he did sell this right, and did receive the stipulated price, is beyond doubt. If the title once passed from the minors to Talbot, that is the end of the matter. Any wrong in the location and entry, if wrong there was, was one which only the government could challenge; and could not be made by a private individual, even the minors themselves, the basis of attacking complainant's title.

Now, this right to enter and locate 80 acres was a thing of value,—something which enlarged the estate of the minors,—was property. It was personal property, going with them where they went; could be exercised and enjoyed anywhere; did not descend to the heir; was not attached to any particular tract of land; was therefore neither permanent, fixed, nor immovable. It was a mere right of selection and taking. Like all property, it was the subject of sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld. To preserve the Indian's title an express restriction is inserted in the patent. The same or something equivalent is always necessary to stay the power of disposal which attends the ownership of property. When this right has been exercised, the location and entry made, who would doubt the right to sell the land? Yet why should the right to sell exist after entry and not before? Congress has placed no restriction,—who may? It must be borne in mind that this is not a case in which there is to be future consideration or future duty. It is personal, in that only they of a certain class can avail themselves of the gift. It is not personal in the sense that future services or future conditions are imposed. Services already rendered during the war are the consideration. The homestead duty of occupation or improvement has already been performed. It amounts simply to this: In view of what has been done Congress makes this gift. It places no restrictions on the donee, but leaves him to use the gift as he sees fit. Why may he not sell it?

I see no satisfactory reason to the contrary. Hence I answer the two questions in the affirmative. Decree will be entered in favor of the complainant.

---

### YICK WO v. CROWLEY.

(Circuit Court, D. California. January 20, 1886.)

INJUNCTIONS—REV. ST. § 720—PREVENTING ARRESTS BY STATE OFFICERS FOR VIOLATION OF UNCONSTITUTIONAL CITY ORDINANCES.

The circuit court cannot issue an injunction to prevent a police officer of a city from serving warrants of arrest issued by a state court for violation of city ordinances claimed to be in contravention of the fourteenth amendment of the United States constitution and the treaty with China.

In Equity.

*Hall McAllister, D. L. Smoot, and L. H. Van Schaick*, for complainant.

*Alfred Clarke*, for respondent.

SAWYER, J., (orally.) In the bill the complainant alleges that Patrick Crowley, respondent, is chief of police of the city and county of San Francisco, and that he has certain warrants, by virtue of which he is about to arrest complainant, a citizen of China, and a large

number of other Chinese subjects, upon the charge of violating certain ordinances adopted by the board of supervisors of said city and county, which he alleges to have been passed in violation of the fourteenth amendment to the national constitution, and of the stipulations of the treaty between the United States and the empire of China. Complainant sues on behalf of himself, and 150 others, and prays "that the said Patrick Crowley, chief of police, as aforesaid, may be enjoined and restrained from enforcing, by arrest or otherwise, the aforesaid ordinances, to-wit, section 1 of order 1559, section 1 of order 1569, and sections 67 and 68 of order 1587."

Section 720 of the Revised Statutes is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This provision was carried into the Revised Statutes from the statute of March 2, 1793, expressly prohibiting any interference on the part of a national court with proceedings in the courts of a state. That statute has been construed a great many times by the supreme court. As early as 1807 the case of *Diggs v. Wolcott*, 4 Cranch, 179, arose, in which an action was brought in a state court upon a certain instrument in writing. The defendants afterwards brought suit in chancery in the state court to cancel the instrument and enjoin the proceedings in the case. The chancery suit was removed to the United States circuit court, where a decree was entered enjoining the proceedings in the state court. On the appeal the court says:

"The case was argued upon its merits by C. Lee and Swann, for the appellants, and by P. B. Key, for the appellee; but the court, being of opinion that a circuit court of the United States had no jurisdiction to enjoin proceedings in a state court, reversed the decree."

That decision has since been followed in a great many cases, arising under a great variety of circumstances; as in *U. S. v. Collins*, 4 Blatchf. 156; *Fisk v. Union Pac. R. Co.*, 6 Blatchf. 399; *Riggs v. Johnson Co.*, 6 Wall. 195; *Orton v. Smith*, 18 How. 265, 266; *Slaughter-house Cases*, 10 Wall. 298; *Dial v. Reynolds*, 96 U. S. 340; *Peck v. Jenness*, 7 How. 625; *Haines v. Carpenter*, 91 U. S. 257; and many others in the circuit and supreme courts.

There are other cases, however, not necessary to notice here, limiting the provision and rule to proceedings *first commenced* in the state court; and where a United States court has first obtained jurisdiction over the parties and the subject-matter, holding that it is entitled to proceed to the conclusion and execution of its judgment, unaffected by any subsequent proceedings in a state court of co-ordinate jurisdiction, and that, to enable it to give effect to its proceedings in such cases, it may even enjoin adverse proceedings in a state court.

In the bill this court is asked to restrain the execution of process issued by a state court, and placed in the hands of the chief of police,



whose duty it is to execute that process. The service of process is a *proceeding* in the court. But in *Riggs v. Johnson Co., supra*, the court says:

"State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and, in their respective spheres of action, the *process* issued by the one is as far out of the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye."

In the case of *U. S. v. Collins, supra*, it is held that *no process* of a state court, preliminary to the final determination of the case, can be stayed by injunction issued out of a United States court. The court says:

"The fifth section of the act of March 2, 1793, prohibits the courts of the United States from granting an injunction to stay proceedings in any court of a state. This term 'proceedings' may properly, and I think must necessarily, include all steps taken by the court, *or by its officers under its process*, from the institution of the suit, until the close of the final process of execution which may issue therein."

The supreme court has likewise held that a national court not only cannot directly restrain a state court, but cannot restrain its proceedings even by an injunction issued against the parties to a suit in the state court. In *Peck v. Jenness*, 7 How. 625, the court says:

"The fact, therefore, that an injunction issues *only to the parties* before the court, *and not to the court*, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. The act of congress of the second of March, 1793, declares that a writ of injunction shall not be granted 'to stay proceedings in any court of a state.' In the case of *Diggs v. Wolcott*, 4 Cranch, 179, the decree of the circuit court had enjoined the defendant from proceeding in a suit pending in a state court, and this court reversed the decree because it has no jurisdiction to enjoin proceedings in a state court."

As recently as the case of *Haines v. Carpenter*, 91 U. S. 257, the same doctrine was announced in the following language:

"In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer to the bill."

In that case it was attempted to restrain the state court through an injunction against the parties, and the supreme court holds that this cannot be done. The same doctrine was repeated in *Dial v. Reynold*, 96 U. S. 340.

The proceedings which are here sought to be restrained are proceedings in a state court, in which warrants have been issued against the complainant and many others, and placed in the hands of the executive officer of the court for service. It is sought to enjoin the service of process, which would be to stay the proceedings, and prevent the court from acting in the case. This is clearly within the prohibition of the statute, as repeatedly construed by the courts; and this court has no authority to restrain those proceedings. Within the last 15 years a great many applications, under a great variety of circumstances, have been made to this court for preliminary injunctions to restrain proceedings in the state courts in civil causes, and they have invariably been denied. This court has no authority to restrain proceedings *first commenced* in a state court, nor has a state court authority to restrain proceedings in this court. The court, therefore, has no jurisdiction to grant the relief sought in this bill.

Let the order to show cause be discharged, and the application for an injunction denied. The demurrer to the bill is also sustained for want of authority to grant the relief sought, and the bill dismissed.

---

MEANS and another v. REES and others.

(Circuit Court, E. D. Tennessee, S. D. January 4, 1886.)

**SALE OF STOCK—RESCISSION OF CONTRACT—FRAUD—MISTAKE—EVIDENCE.**

No fraud, deceit, or mutual mistake justifying a rescission of the contract sought to be avoided being shown, the bill is dismissed.

In Equity.

*R. L. Bright and De Witt & Shepherd*, for complainants.

*Key, Richmond & Clark and Wheeler & Marshall*, for respondents.

KEY, J. The bill in this case was filed by complainants in the chancery court of the state of Tennessee, in February, 1883. The cause was removed by respondents into this court. The bill alleges that respondent Rees, and his agent, respondent Wilder, sold them one-half the stock in the Roane Mountain Steel & Iron Company, a corporation created by the state of North Carolina, for the price of \$71,500. This company had stock to the amount of \$143,000. Complainants aver that, in making the trade, they relied upon the representations of Rees and Wilder as to the quantity of land belonging to the company, its character, cost, and value, the nature and quality of the title by which it was held, and all the general facts and ingredients which entered into their consideration in estimating the value of the stock. Complainants say that since the contract was executed they have discovered that they have been imposed upon, and that respondents' representations were false, or exaggerated to such an ex-

tent that they find a comparatively worthless purchase upon their hands, and complainants ask to have the contract rescinded and the parties placed *in statu quo*. The respondents deny all the fraud charged.

It is asserted that Wilder and Rees represented that the company owned 143,000 acres of land, which cost them and was worth one dollar per acre; that it was covered with valuable timber of great variety, had wonderful beds of magnetic iron ore, fine and abundant water-power, and fertile soil; that the great inducement with them to trade grew out of the quantity and value of the land for its timber and soil. I do not believe the record sustains this allegation. The record shows, beyond question, that the mineral properties of the land were the great and controlling matter in the purchase. Robinson, with a piece of ore taken from this land, came to Wilder to ascertain from whence the ore came, and whether the land where it was found could be purchased. The question discussed by every one, on all occasions pending the negotiations, was the ores, their quantity and quality; and the timber, water-power, and transportation were mentioned as incidental and auxiliary subjects, affecting the development and working of the mineral property. Perry and Wetherby were sent to examine the ores. When complainants went upon the property, just after the purchase of their stock, they went to investigate the ores, and confined their examination to the ores, and when, as a step towards placing their stock in the market, Prof. Wetherby was sent to make an examination of the property, his attention was directed to the ores, and his report of his investigations deals with the ores as the controlling element of value, and with the timber, water-power, etc., as incidental to and useful in developing and operating the property. It is clear that complainants' claim, that they negotiated for and purchased the stock because of the value of the lands for timber and agricultural purposes, has not been maintained successfully.

It was disclosed in the negotiations between the parties that a large amount of surface rights upon the property had been sold, but that the mineral rights had been reserved, and no objection was made on that account; and, at a later day, Means urged Wilder to convey to the company the mineral rights in some thousands of acres of land on the top of Roane mountain. The minerals were always and everywhere considered; but, though this be so, it does not follow that if Wilder and Rees have made false statements in regard to the minor and inferior elements of value in the transaction, for the fraudulent purpose of inducing complainants to purchase the stock, and if they succeeded because complainants believed and relied upon such statements, the complainants are not entitled to relief. But if complainants give unreal reasons for their action, we may look to that fact, so far as it may shed light upon the entire transaction,—upon their motives and good or bad faith in bringing their suit.

The great point of contention is as to the quantity of the land. Complainants say they believed they were purchasing 143,000 acres; that Wilder represented, as a positive fact, that there was that quantity, and they accepted his statement as a fact. They say that if they had known that the deeds, the opinion of Pettibone, the attorney who had examined and reported upon the titles, or the minutes of the company, had shown that there were but 46,000 acres of the land, they would not have purchased the stock. Wilder admits that he always stated that he believed there were at least 143,000 acres, but that he gave it as a mere opinion, and one that he believed correct. There appears to me very little in the assertion of complainants on this point. Wilder never professed to know how many acres there were. He felt quite sure there were 143,000, and thought there might be more,—there might be 160,000 or 200,000. He had made a partial survey, and, coming to the conclusion that there was largely more land than was supposed in the assessment of taxes against the company, the survey was not closed. Their taxes were but \$90. The inevitable inference from all this is that the general understanding of the tax assessors and the public was that the company had greatly less than 143,000 acres. It is reasonable to presume that this conclusion was reached by examination of the recitations of the grants, or other title papers. At all events, there was so great a difference between the common estimate as to the acreage and Wilder's estimate, predicated upon a partial survey, that the survey was never completed. From this it is clear that Wilder never knew, or professed to know, the number of acres; but gave it as his firm and decided opinion always that there were 143,000 acres or more, but that the estimate of acreage has been greatly less,—so much so that the taxes on the land had been only \$90. A partial survey, however, had convinced him that the area was so much larger than the estimate upon which assessments for taxes had been based, that his survey had not been closed, because, if completed, it would have shown so much larger acreage as to have very materially increased the taxation on the land. An examination or knowledge of what the papers and deeds of the company show as to this point would have added nothing to this, nor contradicted Wilder's representations in this respect; so that complainants are mistaken when they assert that they should have incontinently abandoned the negotiations had they seen that the deeds and other papers and records of the company recited that there were only 46,000 acres of the land; for these recitations do not in any sense contradict Wilder's statements. The proof shows that Wilder did have a surveyor, McElevee, to investigate the extent and boundaries of the land, and that he, after running one of the lines and examining the boundaries, reported to Wilder that, in his opinion, to close the survey would show such an increase of area as to materially increase taxation, and that the survey had better be abandoned. He estimated that the average length of the lands was

28 miles, and their average breadth 8 miles, and the number of acres of such a territory would be a fraction over 143,000. It would seem, therefore, that Wilder had formed his opinion from McElevee's report of his investigations.

The complainants, in all their explorations, appear to have kept in view the mineral character and resources of the property. According to their own statements, Perry was sent to investigate the mineral resources of the property. When they, accompanied by Prof. Wetherby, went upon and over the property a few days after the purchase, the whole attention of the party was directed to the mineral character of the lands, and when Prof. Wetherby and his party, in July, 1881, went upon the land, it was to open up and lay bare its minerals, and he spent months in exploring them. His report gives a glowing account of the mineral resources of the property, and shows that the timber, water-power, and soil are sufficient to support, develop, and operate it. A letter from complainant Means to Gen. Wilder, dated November 18, 1881, sheds much light on this branch of the case. In it he says:

"The great question as to quantity of our magnetic ores has not been definitely determined, and this fact may delay investments another season, unless Prof. Wetherby, with his limited examination of the property, feels willing to impress inquirers that there is an abundance for all practical purposes. And we must not forget that his is the only positive knowledge we have on the subject. He has a good opinion of the property, however, though he admits it is based largely on local information and conjecture."

Complainants had been upon the ground, Wetherby had made his report, and it was all that complainants could have desired. Ten months almost had gone by since the stock had been purchased,—a period ample for all kinds of investigation,—and the stockholders of the Roane Mountain Steel & Iron Company met in Cincinnati, complainants among them, and increased the capital stock of the company to \$500,000—\$300,000 of an increase,—notwithstanding nothing had been added to the property save the mineral rights to a few thousand acres of land on Roane mountain, one of the highest elevations east of the Rockies. A part of the stock was put upon the market for sale; but, notwithstanding Wilder's description, Wetherby's report, and the best efforts of complainants, who then believed all that Wilder and Weatherby said, and could speak somewhat from personal examination, not a single purchaser of the stock was found. Campbell said it had too much titanitic acid, and so did Schoenberger. Murdock's friend said it would take \$500,000 to make a way out for the transportation of the iron, etc., and as the property is in the midst of the highest mountains east of the Mississippi river, his estimate is likely not extravagant. The capital stock was raised March 15, 1882, and \$100,000 of it placed at par in the market. Nearly two months passed away and no sales were made, and May 11, 1882, it was "resolved that the words 'not less than par,' contained in the resolution

in directors' meeting of March 15th, at 4 o'clock p. m., on page 17 of the minute-book, be hereby stricken out, and the words 'not less than forty cents upon the dollar' be inserted instead." At the expiration of another month no stock had been sold at the reduced price.

About the first of July, Wetherby went upon the property again to survey it, and ascertain the quantity of surface rights. Williams went close upon his heels to investigate titles. That such an attorney as Williams shows himself to be should have been selected by any person of intelligence, acquainted with him, for so grave a duty, passes comprehension, unless upon the theory that he would make such report of his investigation as his client might wish. At all events, Wetherby, in a much shorter time than his first examinations consumed, reports a great deficiency of area; and Williams discovers an alarming defect of titles and quantity of surface rights; and complainants concluded it was land they wanted, and not iron. In the mean time, steel had so declined in price that these magnetic ores, whose great value depended upon their steel-making qualities, greatly fell in value. No complaint is made that there is any deficiency in the quantity or quality of the ores. It is nowhere shown that these veins of ore extended for a less distance than 15 miles over the property, or that they are not abundant in ores of fine quality. Wetherby's report and Means' admissions justify Wilder's representations as to the ores.

It is also alleged that the title to a great part of the lands is defective, and that Wilder represented it as good, and that complainants accepted and acted upon his statement as to this; and much proof, some of which is incompetent, has been produced to show defects in the title. Wilder, on almost every occasion when he spoke of the matter, said that he had one of the ablest lawyers of his region of country, A. H. Pettibone, to examine and investigate the title; that he had made an abstract thereof, and given the opinion that it was good. Wilder's opinion was based on Pettibone's judgment and conclusion, and was the result of confidence in it. Complainants knew this from his conversations, and were as well prepared as Wilder to form their conclusions from his *data*, unless he asserted a falsehood as to Pettibone's examination of the question, or as to his ability and character as an attorney, which nowhere appears. The negotiations of the twenty-fifth of February, 1881, at Gen. Wilder's residence contradict this position of complainants. Complainant Means and Campbell carried to Wilder a proposition dated February 24, 1881, signed by complainants and Schoenberger and Campbell, which stated that "they had accepted your proposition" (Wilder's and Rees') "hereto attached, regarding the sale of the Roane Mountain Steel & Iron Company, of Mitchell county, North Carolina, provided that, upon further examination, the said property, title, etc., prove satisfactory to us and our associates, and as represented in your several communications to Mr. Mendenhall, Mr.

Means, and Mr. Robinson; the examination of the title, etc., to proceed at once, and examination of the property to be made as soon as weather and other engagements will permit." The proposition referred to as "hereto attached" must have been the one made to Robinson. He at once had placed himself in negotiation with complainants and their friends, and no other proposition had been made on the eighteenth day of November, 1880. It had been discussed frequently between Mendenhall and Robinson, and Means and Mendenhall. Means and Mendenhall had called upon Wilder early in February, 1881, in reference to the trade, and spent a day with him. Letters had passed between the parties. Now, if complainants had, from the first, placed such reliance upon and confidence in Wilder's representations as to the area of land and its title, why did they on the twenty-fourth day of February, 1881, in their proposition of acceptance, provide for an examination of the property and title, so as to satisfy themselves and their associates that the representations which Wilder had made to them were true? The paper was prepared and signed by themselves. If, as complainants say, the titles had not been before them or discussed at the meetings with Wilder, how does it happen that they speak of his representations in regard to these matters, and reserve the right to investigate their truth? The offer made by Means, Mendenhall, Schoenberger, and Campbell was not satisfactory to Rees and Wilder, and, after some discussion, was not acceptable to Means and Campbell. Means and Mendenhall copied the paper they had brought, and left the copy with Rees and Wilder, and kept the original. Means drew up the offer of Rees and Wilder, and Wilder amended it, and kept a copy, and gave Means and Mendenhall one; and these two papers—that signed by Rees and Wilder, dated twenty-fifth February, 1881, and that signed by Means, Mendenhall, Schoenberger, and Campbell the day before—embodied the propositions of the parties. The Rees and Wilder proposition was substantially the one Robinson was authorized to make. They differed in some minor details. Robinson was authorized to sell Rees' stock for \$100,000, but Rees was only to be paid \$71,500. Robinson was to have the residue. Mendenhall and Means knew this, and the paper giving the terms was attached to the offer of twenty-fourth February, 1881. In the matter of the Robinson payment, there was no stipulation as to time of payment, nor was there any provision as to the character of subscriptions and subscribers for the stock. In their proposition of the twenty-fifth of February, 1881, Rees and Wilder met, and accepted the proposition of the twenty-fourth of February, and the offers of both parties added a new element mutually applicable to both; and that was that new subscriptions and subscribers for the new stock should be satisfactory to both parties; but, as Campbell and Schoenberger were not present to agree to the amendment to their offer of acceptance, the trade was not concluded, and awaited their ratification. About all that was left for

the parties to do was for Schoenberger and Campbell to assent to the provision that the sales of the stock of the company should be satisfactory and to satisfactory persons, and for the complainants and their associates to satisfy themselves as to the truth of Wilder's and Rees' representations as to the property, its title, etc.; and this was to be done as promptly as the nature of circumstances would admit. We find Wilder following this action of twenty-fifth of February by urging the examination stipulated for. We find complainants sending Perry to examine the property in April, before the snows had left it. On May 10, 1881, complainants wrote to Gen. Wilder:

"We will close the contract for purchase of one-half the stock, or Mr. Rees' interest, in the Roane Mountain Steel & Iron Company, but desire that you grant us thirty days longer to make the first payment."

May 11, 1881, Wilder refers to their letter of the tenth of May, and agrees to the postponement of the first payment as desired. At most, it must be presumed that they had made the investigation they had provided for in respect to Wilder's representations, or waived it. On May 25, 1881, the papers were formally executed, transferring the stock. The various steps taken while the negotiations were pending, the history of the transaction as it appears from the papers, as well as the testimony of disinterested witnesses, seem to sustain respondents' theory of the case. At all events complainants, upon whom the burden rests of making out their case, fail to establish it by the necessary preponderance of proof.

The parties are all able, intelligent, and experienced gentlemen, filling the higher positions of society, and pursuing the higher walks of business; each man of them able to take care of himself. There is nothing of ignorance as to the nature of the transaction. They are all experienced iron men. If any of them have been disappointed in their expectations on account of the vicissitudes of business, or the fluctuations in the prices of iron and steel, arising from new inventions, discoveries, or other like causes, so that hardship and loss have resulted, or if their judgment has been in error, there can be no relief on that account. There must have been fraud, deceit, or mutual mistake, to such an extent as to have operated so far as to have brought about the contract. In other words, the fraud or mistake must have been such that the agreement would not have been made in its absence, before a rescission of the contract would be decreed.

It is not insisted, very seriously at least, that there are any grounds for relief under the bill in this case upon any mistake. No such case is made by the bill or the evidence. So far as the charge in respect to Wilder's misrepresentations as to the distance and cost of a railroad to connect the property of the company with the road running to Cranberry is concerned, it appears from the minutes of the proceedings of the stockholders and directors of the company that they at no time considered the utility of such a route; but, on the contrary, desired and encouraged the building of a railroad from the



company's property to the East Tennessee, Virginia & Georgia Railroad, without any complaint or criticism of Wilder's representations, or investigation or survey, experimental or otherwise, for a route to the Cranberry road, and all this while complainant Means was president of the company. That Wilder was exceedingly enthusiastic in regard to this property, and puffed its prospects and capabilities with the zeal of an enthusiast, is evident. This must have been apparent to complainants. The difference in his estimates or opinions as to the area of the lands of the company, and his stories as to the speckled trout, as detailed by complainants, should have put, and probably did put, complainants upon their guard and inquiry as to his statements generally. As already stated, complainants are gentlemen of ability, intelligence, and experience, and not lambs to be led to the slaughter. It is probable that when the capital stock of the company was raised to \$500,000, and put in the market largely, if it had sold well, this litigation would never have taken place. Courts, however, cannot encourage men who are able to attend to their own business to delay and experiment before calling upon the courts to declare a rescission of their contracts. If suitors be not required to use diligence, courts would be overwhelmed with controversies, and business would suffer. In this case, the contract was closed May 11, 1881, and yet complainants, with every opportunity to examine the property of the company, and with the duty resting upon them to do so before inviting others to purchase interests from them, did not commence this suit until February, 1883. Complainant Means was so occupied with a canvass for mayor of Cincinnati just previous to the contract, and so immersed in the duties of that office afterwards, that he gave the contract little consideration after his and Campbell's interview with Wilder and Rees, twenty-fifth February, 1881, or to the investigation of the affairs, property, or condition of the company afterwards. It may be, and it doubtless is, patriotic to sacrifice personal interests to the public good, but I am not aware that a court of equity can find ground of relief in negligence to private business or interests so brought about.

In the immense mass of testimony in this record, relevant and irrelevant, competent and incompetent, much of conflict and disagreement appears in the personal testimony of the parties to the suit. I have not attempted to criticise or compare their discrepancies and differences, as, in my judgment, they do not change the aspect of the case as exhibited and manifested by its general features, and the documentary and other written testimony. It is a disagreeable exemplification of the weakness and deformities of the memory and understanding when we discover, as we do in this record, how far gentlemen in the highest circles of life and business can differ in their recollection and statements.

The conclusion arrived at is that the bill must be dismissed at the cost of complainants; and it is so ordered.

UNITED STATES *v.* BRIGHTON RANCHE CO.*(Circuit Court, D. Nebraska. May Term, 1885.)***PUBLIC DOMAIN—TRESPASS—INJUNCTION TO RESTRAIN PURPRESTURE.**

Where persons build a fence partly on their own land and partly on lands belonging to the government, whether the act be technically a purpresture or simply a public nuisance, an action may be maintained in equity to compel, by mandatory injunction, the removal of the fence from the government land.

**On Exceptions to Answer.**

*G. M. Lambertson*, for the United States.

*J. M. Woolworth*, for defendants.

BREWER, J. This case comes before us on three exceptions to the answer. Judge DUNDY and I have each examined the case, and agree in conclusions which I now announce.

The underlying facts are these: The defendant has built a fence, partly on his own land and partly on land belonging to the government, and inclosing a tract of several thousand acres. This is an action in equity to compel, by mandatory injunction, the defendant to remove its fence from the government land, and thus leave the inclosed government land free from all obstructions to approach. Of course, the government title is conceded, and its right to proceed by an action of ejectment to remove the defendant from occupancy of any of its land is unquestioned.

The question made is whether the government can come into a court of equity and avail itself of the summary remedies given by such a court. We are of the opinion that it can; and, whether the act of the defendant comes within the technical definition of purpresture or that of a public nuisance, we are of the opinion that the government can come into a court of equity and by its orders have an end put to this trespass on the public rights.

Something was said in the argument in respect to the government tolerating such occupation of its public land, and the answer alleges that it has been the policy of the government to permit occupation similar to that of the defendant. The case of *Rector v. Gibbon*, 111 U. S. 276,<sup>1</sup> is cited in support of this view. Doubtless the government has and does tolerate in a certain sense the occupation of the public lands, and wherever such occupation is either under the homestead or pre-emption act, or other acts, with a view to the purchase of the land, the occupation may be considered rightful. But the answer fails to disclose an occupation with any such intent, and the only occupation disclosed is one, not for the purpose of subsequent purchase, but with the idea of getting the benefit of the land for grazing purposes. Even if the policy of the government heretofore had been to tolerate the occupation and inclosing of tracts of government land for grazing purposes, the fact that an action is now commenced

<sup>1</sup> S. C. 4 Sup. Ct. Rep. 605.

to put an end to such occupation is conclusive that the policy of the government is changed, and no rights are acquired against the government by a hitherto unchallenged occupation. So long as the government does nothing, an individual might, perhaps, not challenge the occupation by defendant; but the right of the government to interfere, to challenge the occupation, and to compel the defendant to desist from it, is not lost by mere delay in enforcing it.

We think, too, an action of injunction is the appropriate remedy, and that an action of ejectment would not furnish full protection to the government. Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separate the inclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a court of equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property. In this view the first and second exceptions must be sustained.

---

ROBINSON v. BAILEY.<sup>1</sup>

(Circuit Court, N. D. Iowa, E. D. November, 1885.)

1. TAX TITLE—TREASURER'S DEED—EVIDENCE.

In an action to quiet title, under the provisions of section 897 of the Iowa Code, it is incumbent upon defendant to show that he has a title or interest in the land in dispute, before he can be permitted to question the validity of the title presumptively shown to be in complainant by the production of a treasurer's deed, executed in pursuance of a sale made for delinquent taxes, regular in form and execution; and that the case is tried on stipulated or agreed facts will not change the rule in that respect.

2. SAME—SWAMP LANDS—CONVEYANCE BY COUNTY BEFORE TITLE PERFECTED.

Where, at the time a deed of swamp lands was issued, the county was prohibited by statute from issuing such deed until the title to the land was perfected in the county, a covenant of warranty in such deed will not inure to the benefit of the grantor, or a party to whom he has conveyed the land, and vest a good title in him when the title is finally perfected in the county.

In Equity. Bill to quiet title.

*Powers & Lacy*, for complainant.

*Henderson, Hurd & Daniels, A. F. Call, and Geo. E. Clarke*, for defendant.

SHIRAS, J. In this cause a decree for complainant was ordered at the November term, 1884, whereupon the defendant petitioned for a rehearing, which was granted, and the cause has been fully reargued by counsel.

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

The suit is brought for the purpose of quieting the title to certain realty situated in Pocahontas county, the complainant claiming title thereto under certain tax deeds executed by the treasurer of the county in pursuance of a sale made in October, 1876, for delinquent taxes assessed and levied on the lands for the years 1874 and 1875. The defendant claims title under John M. Stockdale, to whom the lands were conveyed by a warranty deed, executed by the county of Pocahontas in 1860; the said lands being part of the swamp lands granted to the state of Iowa by the act of congress of 1850. By an act of the general assembly of the state of Iowa passed January 13, 1853, the swamp lands granted to the state were granted to the several counties in which they were situated, and by an act passed in 1855 it was provided that such lands should not be sold or disposed of until the title was perfected in the state. The patents of the lands in question from the United States to the state of Iowa, and from the state to the county, were not issued until in 1876. On part of the defendant it is claimed that it does not appear that the lands were liable to taxation in the years 1874 and 1875, and that, consequently, the bill should be dismissed without inquiry into the right or title of the defendant.

By the provisions of section 897 of the Code of Iowa, it is enacted that, in all controversies or suits in relation to the rights of the purchaser to the land conveyed by a treasurer's deed, such deed shall be presumptive evidence "that the real estate conveyed was subject to taxation for the year or years stated in the deed." The introduction of the treasurer's deed, therefore, on behalf of complainant, made out a *prima facie* case on his part, which required to be overthrown by countervailing evidence on behalf of defendant.

Section 897 of the Code enacts that "no person shall be permitted to question the title acquired by a treasurer's deed, without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale." Under the provisions of this section, before defendant could be permitted to question the validity of the title claimed by complainant as evidenced by the treasurer's deed introduced on his behalf, it was necessary for defendant to show that he had or held some interest or right in the premises, otherwise, as against him, the complainant would be entitled to a decree.

In the case of *Sully v. Poorbaugh*, 45 Iowa, 453, it appeared that the suit was brought to quiet the title to 120 acres of land, to which complainant, Sully, claimed title under a treasurer's deed, executed in pursuance of a sale made for delinquent taxes. The land formed part of the swamp lands conveyed to Jasper county. The defendant claimed that the lands were not subject to taxation for the year 1864, because they then belonged to the county. The defendant established a title in himself to 80 acres, but failed to do so as to the remaining

40 acres. The supreme court of Iowa held that the lands were not taxable for the year 1864, and that, as to the 80 acres to which defendant had shown title, the decree must be for defendant; but that, as to the remaining 40, there must be a decree for plaintiff, because defendant had failed to show a title therein authorizing him to question the right of plaintiff under his tax deed, the same being regular in form. See, also, *Lockridge v. Daggett*, 54 Iowa, 332; S. C. 2 N. W. Rep. 1033, and 6 N. W. Rep. 231; and *Parker v. Overmann*, 18 How. 137.

There can be, then, no question that, under the provisions of section 897, as construed by the supreme court of Iowa, it was incumbent upon defendant to show that he had a title or interest in the lands in dispute, before he could be permitted to question the validity of the title presumptively shown to be in complainant by the production of the treasurer's deed, regular in form and execution.

There is no force in the suggestion, on part of defendant, that this cause stands in a different position by reason of the fact that the evidence is mainly in the form of a stipulation or agreement reciting the facts. In all cases in equity the evidence is reduced to writing, and is on file before the cause is taken up for trial, and the facts in the one case just as much appear of record as in the other. The difference in form, between facts proven by proper evidence on record and facts admitted by a stipulation, can make no difference in the legal rights of the parties. The stipulation is merely evidence of the facts recited therein, and, so far as the point under consideration is concerned, the case is to be viewed just as it would be if both parties had taken testimony by deposition, instead of agreeing upon the facts. By the introduction, therefore, of the treasurer's deed, the complainant has established his right, *prima facie*, to a decree quieting his title as against defendant, and the burden is thereby cast upon the defendant of showing—*First*, title in himself; and, *second*, invalidity in the tax title.

The main ground relied upon in argument by defendant in support of the defense of invalidity in the tax sales is that, in the years 1874 and 1875, the title to the lands was in the state of Iowa, although the evidence of such title was not fully completed until the patent was issued, in 1876; that the title in the county was not completed until in December, 1876, when the patent from the state to the county was issued; and that, according to the provisions of the act of the general assembly of Iowa, passed in 1855, the unorganized counties of the state, of which Pocahontas county was then one, were restrained from selling the swamp lands donated to them by the previous act of 1853, until the title thereto was perfected in the state, and the expense incurred in selecting the same had been refunded to the state.

The act provides "that no swamp or overflowed lands granted to the state, and situate in the present unorganized counties, shall be sold or disposed of till the title to said lands shall be perfected in the

state, whereupon the titles to said lands shall be transferred to the said counties where they are situated: provided, that said counties shall refund to the state the expenses incurred in selecting said lands, under the provisions of 'An act,' etc. Counsel for defendant claims that the act greatly changed the *status* of the swamp lands in the unorganized counties, and that under this act "the state retained the entire control of them, and the counties were prohibited from attempting to do anything with them until they got a title, as provided for in the act."

Admitting this to be so, what becomes of the title upon which defendant relies? It is admitted that the defendant claims only under a deed executed in 1860 by the county to one John M. Stockdale. When this deed was executed, the title to the lands had not been perfected in either the state or county, and therefore, by the express provisions of the act of 1855, if the same was then in force, the county was prohibited from selling or disposing of the lands. The contract for the sale of the lands, and the deed made in pursuance thereof, were therefore in violation of the express provisions of the statute, and were wholly void. No title in or right to the lands passed to the grantee, Stockdale, and, having acquired no title, he could convey none to his subsequent grantees, all of whom would be chargeable with knowledge of the invalidity and illegality of the attempted sale to Stockdale, in violation of the restrictive provisions of the act of 1855. The defendant, while maintaining, on the one hand, that his grantors had no title prior to the issuance of the patent to the county in 1876, claims, on the other, that when the title did vest in the county in 1876, it inured to his benefit, because the deed from the county to Stockdale in 1860 contained covenants of warranty. If such an effect should be given to the deed and its covenants, it would defeat the provisions of the act of 1855. That act prohibited the county from selling or otherwise disposing of the lands until the title was perfected in the state, which was not done until in 1876. The purchaser, Stockdale, knew, when he received the deed in 1860, that the county had no right to sell the land, being expressly prohibited from so doing. The deed was therefore void, and the covenants cannot be allowed to work out a result which the county was prohibited from doing by express provision of the law. If this were permitted, the statutory restriction could in every case be avoided simply by the device of procuring a deed with covenants of warranty.

It is not a case for the application of the doctrine that an after-acquired title will inure to the benefit of a grantee holding under a deed with covenants of warranty. That rule is applicable to cases wherein the grantor, having the power and legal right to contract for the conveyance of certain premises, executes a deed with covenants of warranty, yet, in fact, was not at the time possessed of the land, or of the full estate therein, which he assumed to convey, and of which he afterwards becomes seized. Under such circumstances, the

grantor would be estopped from asserting the rights acquired after the date of his deed, against the grantee therein. If, however, the grantor was under a legal disability, and consequently without the right to contract according to the provisions of the deed, then the covenants therein would not work an estoppel upon the grantor. Thus, the supreme court, in *Bank of America v. Banks*, 101 U. S. 240, ruled that, "in order to work an estoppel, the party to a deed must be *sui juris* competent to make it effectual as a contract. Hence a married woman is not estopped by her covenants."

In the present case, the contract made by the county for the sale of the lands, if the act of 1855 remained in force, was absolutely void, being prohibited by the terms of that act, and the county had no right to deed the lands, or to contract for the sale of the same in the future. Under such circumstances, the covenants in the deed cannot have the effect of validating the deed itself, nor the contract evidenced thereby; nor can they be given force by way of estoppel. The fact, therefore, that in the year 1876 the title to the lands was perfected in the state and county does not show that defendant then acquired a title, provided it be true, as claimed by counsel for defendant, that the act of 1855 was operative in 1859, when the contract for the sale of the lands was made by the county, and in 1860, when the deed thereof was executed to Stockdale, under whom defendant now claims title.

Assuming, therefore, that the position of defendant in regard to the act of 1855 being in force in 1859 and 1860 is correct, it follows that the claim of title relied upon by defendant is wholly void, and, having thus failed in showing that he had a title to the lands in dispute, defendant cannot, according to the provisions of the statute of Iowa, question the validity of the *prima facie* title established in complainant by the introduction of the treasurer's deed. The decree originally entered is therefore affirmed.

BREWER, J., concurs.

# THURBER and another v. OLIVER.<sup>1</sup>

(Circuit Court, D. Maryland. April Term, 1885.)

## 1. COLLATERAL SECURITY—STORAGE RECEIPT BY PERSON NOT A WAREHOUSEMAN—VALIDITY—ACT OF LEGISLATURE MARYLAND 1876, c. 262.

Under the Maryland act of legislature of 1876, c. 262, as construed in *State v. Bryant*, 63 Md. 66, a storage receipt, issued by a person not a warehouseman, for his own property, in his own possession, is not good against a subsequent bill of sale or assignment for the benefit of creditors.

## 2. SAME—PLEDGE—ESSENTIALS—POSSESSION.

The taking and retaining possession by the pledgee are essential elements in a pledge of goods.

## 3. SAME—GOODS AS COLLATERAL—SYMBOLICAL DELIVERY—SAMPLES.

If goods be pledged to a person as collateral security, but the debtor still retain possession of them, the delivery of samples to the agent of the creditor to facilitate sales of the goods by him on behalf of the debtor is not a delivery of the goods.

Replevin. Ruling upon prayers for instruction to the jury.

In this case the plaintiffs caused to be issued a writ of replevin out of this court on the twenty-first day of June, 1884, under which 3,000 cases of canned tomatoes were taken from a building in Harford county, Maryland, which had been occupied by the defendant, Oliver. Oliver had been for some years engaged in the business of canning tomatoes in Harford county, and in October, 1883, had upwards of 3,000 cases of canned tomatoes in the premises where he carried on this business. Being in need of money to enable him to hold them for better prices, he applied to the agent of the plaintiffs, who agreed to loan him on the security of the goods \$4,200 for four months. Thereupon he executed the following promissory note and storage receipt:

"\$4,200.

HARFORD FURNACE, MD., October 16, 1883.

"Four months after date I promise to pay to the order of H. K. and F. B. Thurber & Co., New York, forty-two hundred dollars, for value received, without defalcation. Along with the foregoing obligation I have delivered to H. K. and F. B. Thurber & Co. 3,000 cases No. 3 labeled tomatoes, as collateral security for the payment of the same on the day that it becomes due; which collateral I hereby authorize and empower the holder of this promissory note (provided the same be not paid at maturity) to sell at public or private sale, and transfer without further reference or notice to me, and apply the proceeds in payment thereof, together with interest and charge incurred thereon. Thereafter, should any deficiency remain unpaid, I further promise and agree to pay the same to the holder hereof on demand.

"THOS. J. OLIVER."

The storage receipt was as follows:

"No. 3.

HARFORD FURNACE, MD., October 16, 1883.

"Received on storage in my warehouse, from H. K. and F. B. Thurber & Co., three thousand cases No. 3 labeled tomatoes; deliverable to the order of H. K. and F. B. Thurber & Co. only on production of this receipt properly indorsed.

THOS. J. OLIVER."

<sup>1</sup> From Maryland Law Record.



The goods remained in the same building until the execution of the writ of replevin, in June, 1884, but Oliver retained possession of the premises only until January, 1884, when the landlord obtained from Oliver the key of the building, with a view of securing his rent, and also obtained from Oliver a duly-executed and recorded bill of sale to secure about \$1,600 of rent claimed. On April 25, 1884, Oliver executed a deed of trust of all his property for the benefit of creditors to Harlan & Webster, trustees, which was duly recorded; and at the time the writ of replevin was executed Oliver had left the premises, and had delivered possession of the goods to an agent of the trustees, who was also an agent of the landlord, and was holding them for the protection of both interests.

There was evidence from which plaintiffs contended that the amount intended to be secured by the bill of sale to the landlord has been paid. There was also evidence tending to show that both the landlord and the trustees for creditors had knowledge, before the conveyances to them, that the plaintiffs had loaned money to Oliver on the security of the goods.

*Blackistone & Blackistone*, for plaintiffs.

*H. W. Archer and A. Stirling, Jr.*, for defendant.

MORRIS, J. It is the misfortune of the plaintiffs in this case that they have now to support their title to the goods replevied by invoking principles of law which were not in contemplation when the transactions were entered upon. When the plaintiffs advanced to Oliver \$4,200, on October 16, 1883, on the collateral security of 3,000 cases of canned tomatoes, they relied for their protection upon the storage receipt as valid and sufficient, under the Maryland act of 1876, (chapter 262,) to pass to them, in the language of that act, "a full and complete title to the property mentioned in the receipt, with all rights and remedies incident to such title." This was at that time generally thought to be the intention and effect of the act of 1876 with respect to such storage receipts. But since the date of this transaction the court of appeals of Maryland, in the case of *State v. Bryant*, 63 Md. 66, has construed the act of 1876, and has declared that its provisions do not apply to storage receipts issued by persons who are not warehousemen, for their own property remaining in their own possession. The court of appeals in its opinion points out that the obvious result of any other construction would be that any individual could issue a storage receipt for any chattel in his possession, and thus entirely subvert the registration laws which have been enacted for the protection of purchasers and creditors. The plaintiffs, therefore, although the evidence shows that the transaction was one based on the validity of the storage receipt under the act of 1876, are now obliged to assert their rights, unassisted by the provisions of that act.

What, then, was the legal character of the transaction which the parties intended to make? The promissory note sets it out plainly:

"Along with this obligation, I have delivered to H. K. and F. B. Thurber & Co. 3,000 cases No. 3 labeled tomatoes, as collateral security for the payment of the same, \* \* \* which I authorize and empower the holder of this promissory note (provided the same be not paid at maturity) to sell," etc.

Suppose that the 3,000 cases of goods had been at that time actually put out of the possession of Oliver into the possession of the plaintiffs, what would the transaction have been, as evidenced by that fact and expressed in this paper? The goods were not sold, assigned, or conveyed to the plaintiffs, but were intended to be simply delivered to them to hold as collateral security for the payment of the note, with power to sell in case of default. This is what the parties thought they were doing, and intended to do; and, if they had effectually accomplished it, the transaction would have been what is known as a pledge of chattels, as distinguished from a mortgage or sale.

The distinction between a mortgage and a pledge is clearly stated by Judge MILLER in *Dungan v. Life Ins. Co.*, 38 Md. 251:

"The general distinction is that in a mortgage the title is conveyed with a condition of defeasance,—that is to say, a condition rendering the conveyance void on the payment of a certain sum of money on or before a day agreed upon,—while in a pledge the goods bailed are deposited as a collateral security, and only a special property is transferred to the bailee, (the general title in the meanwhile remaining with the bailor.) The difference has also been well stated thus: A mortgage is a pledge, and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum by express stipulation, or by the course of trade, to be a lien upon them."

To the same effect is the text in Jones, Pledges, § 8:

"Whenever there is a conveyance of the legal title to personal property upon an express condition subsequent, whether contained in the conveyance or in a separate instrument, the transaction is a mortgage. Thus, if a bill of sale of a horse be made, and at the same time a defeasance be given back by the purchaser engaging that on the payment of the purchase price within a specified time he will redeliver the horse, the transaction is a mortgage, and not a pledge of a horse. An instrument in writing which records a debt, and declares that the debtor does thereby deliver certain property to his creditor to secure the debt, is a pledge and not a mortgage; because there is no transfer of the title to the property, but only a deposit of it. Although an instrument contains a covenant to warrant and defend the title, such as is usual in a mortgage, the character of the instrument is not thereby changed. The covenant is not a present conveyance, but an executory stipulation. A delivery of personal property by a debtor, in security for a debt accompanied by a written agreement, whereby the debtor agrees that if he does not pay the debt by a certain time the creditor may dispose of the property to pay the debt, is a pledge and not a mortgage; for the agreement does not show any intention to transfer a title to the property absolutely or conditionally, but only to deliver the property as security, with a right in the creditor to sell it if the debt be not paid by a certain time."

Thus it appears that the very words by which a pledge is defined in the books are the words used to express the agreement contained in the obligation given by Oliver to the plaintiffs.

If, then, the transaction is to be treated as an attempt to secure the plaintiffs the money advanced by a pledge of the goods, it follows that delivery and continued possession were essential to render the pledge effective. This rule is tersely stated in *Jones on Pledges*, (section 23:) To constitute a "pledge the pledgee must take possession, and to preserve it he must retain possession." The delivery and possession required is not a mere agreement of parties which they can make on paper, but must be some sufficient act of an unequivocal character.

This rule of law is upheld and inexorably applied by the supreme court of the United States in *Casey v. Cavaroc*, 96 U. S. 467. In that case a New Orleans national bank borrowed a very large sum of money from the Credit Mobilier, of Paris, upon an agreement on the part of the bank to place and always keep for the security of the lender a sufficient amount of good negotiable notes in the hands of the firm of which Cavaroc, the president of the bank, was a member. Notes to the required amount were placed in an envelope, and given to Cavaroc to hold as a pledge; but he, finding it inconvenient to take out those maturing from day to day, and to replace them with others in their stead, delivered the envelope to the discount clerk of the bank, and the notes, with those which from time to time were substituted, were kept by him until the failure of the bank, when Cavaroc took and retained them on behalf of the Credit Mobilier. At that time the indorsement of the bank was put upon the securities, which had not been done before. Mr. Justice BRADLEY, delivering the opinion of the court, (page 486,) said:

"It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of pledge. A pledge and possession, which are its essential ingredients, must be made out or the privilege fails. An agreement for a pledge raises no privilege. There is no mortgage; for the title of the securities was never transferred to them. The evidence of the cashier is that they were all stamped, payable to the order of the bank when discounted. They were not indorsed by the cashier until the day they were removed by Cavaroc, which was after the bank failed."

And on page 490:

"Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; because the assignee only takes such title as the debtor has at the time of the assignment or insolvency. In that case, however, the question of fraud would be admissible as a question of fact to invalidate the transaction; but in the present case that question does not arise, or, if it might be raised, it is immaterial. The Credit Mobilier claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons without possession. Bad faith, it is true, would defeat the pledge, though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

In the present case, as in the case just cited, there was no transfer of title, and (independently of the storage receipt) there was no change of possession. The goods were Oliver's, and in Oliver's storehouse before the transaction, and, except as affected by the storage receipt, remained afterwards in precisely the same situation, until possession of them was obtained under the landlord's bill of sale and under the deed of trust for the benefit of creditors. The few cans delivered to Maj. Hancock, who was the plaintiffs' agent after the completion of the transaction, were samples for him to sell by, under an agreement between Oliver and himself, that he might negotiate sales of the goods for him. But, even if there was evidence to support the idea that the delivery of the samples was intended as a sort of symbolical delivery of the whole, such a delivery is not in such a case that which is required by the Maryland statute to change possession so as to pass title without a bill of sale. It is urged by plaintiffs' counsel that the wording of the note and storage receipt evince an intention to deliver the goods. But evidence of intention is only to be considered when the act said to amount to a delivery is an equivocal act which might amount to a delivery or not, according to the intention of the parties. But an act which is not in the nature of a delivery, according to the thing to be delivered, cannot be made a delivery by an agreement or an intention.

Applying this view of the law, it seems to me clear that, at the time the replevin was issued, all that the plaintiff could claim to assert was a lien or privilege against the goods for the amount of their loan, and as that privilege could only be maintained by continued actual possession they must fail in this action. But even if, as against Oliver, it were possible to maintain the action, I think that as against the persons who, since the date of the transaction between the plaintiffs and Oliver, have obtained title by bill of sale and actual possession of the goods, (even with notice of the transaction,) the plaintiffs cannot succeed in this action.

The case of the plaintiff is different from that of a person who has a conveyance of the title to goods sufficient in form to convey the title, and which is only defective for want of compliance with the statute in respect to acknowledgment, recording, or affidavit. In *Hudson v. Warner*, 2 Har. & G. 415, a case much relied upon by plaintiffs' counsel, the court of appeals declared the act of assembly with regard to registration of bills of sale to have for its object the suppression of secret sales, so that no one should be injured or deluded by secret and unknown sales; and the court therefore held that any notice which demonstrated the existence of a lien or the transfer of a right would be sufficient in lieu of registration. But, to make the doctrine applicable, it must first appear that a transaction was intended between the parties to which a conveyance proper for registration was appropriate.

In the view I have taken of the transaction in this case, there never was designed to be any sale, mortgage, or transfer of title to the goods.

The transaction, even upon the theory of the plaintiffs, is that Oliver delivered the goods to the plaintiffs in pledge, and the plaintiffs immediately placed them with Oliver on storage. There is no attempt to make a bill of sale, nor any agreement to make a bill of sale, nor to transfer title. Suppose the claimants, who were in possession under the subsequent bills of sale, and whose titles are set up in the pleas, had known of the whole transaction, and had the storage receipt and the note exhibited to them, I do not see how their rights under these bills of sale could be affected legally by that knowledge, for the storage receipt and note are notice of nothing but what in law they can accomplish. In effect they amounted to this: that Oliver acknowledged that he owed the plaintiffs \$4,200, payable in four months from October 16, 1883, and, as collateral security, he authorized the plaintiffs, in case of default, to take the 3,000 cases of tomatoes out of his possession, and sell them, and apply the proceeds to the debt.

Further, with regard to the deed of trust set up by one of the pleas, it seems to me clear that it is sufficient, without regard to any question of notice, to defeat plaintiff's action. There was actual possession under it at the time of the execution of the writ of replevin. Now, treating the agreement between Oliver and the plaintiffs in the most favorable light, it could at most amount to a contract for security, enforceable in equity, and to be postponed, under the Maryland Statutes, to all creditors of Oliver, who might have become such after its date, and without notice. It is said by the plaintiffs that there are no such creditors; but could this court properly decide that question? Those creditors, if there be any, are not and could not get before this court. They are represented by the trustees. The validity of the deed of trust is not questioned, and such creditors could only assert their claims in a court having control of the distribution of the fund arising from the deed. The question whether there are such creditors, whether their claims, if established, are to have preference, or whether these plaintiffs have an equitable right to be paid in preference to all other creditors, can only be determined by a court of equity distributing the fund, having all the parties before it, and adjudicating their priorities.

The verdict must be for the defendant.

CARRIGAN v. MASSACHUSETTS BENEFIT ASS'N.<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. October, 1884.)

## 1. LIFE INSURANCE—APPLICATION QUALIFYING CONTRACT—PENNSYLVANIA STATUTE.

The Pennsylvania statute, prohibiting an application not attached to the policy to be used in any way to qualify the terms of the contract, does not prohibit the introduction of such an application for the purpose of showing fraud in the procuring of the contract.

## 2. SAME—WRITTEN APPLICATION.

Where the policy and by-laws of the company require a written application by the insured, a paper purporting to be an application, whose questions were not in fact answered by the insured, but which were answered and the paper executed throughout by another, in her name, the policy procured on such application was a fraud and void.

This was an action brought to recover \$5,000 on a policy of insurance on the life of Mary A. McCaffrey, for the benefit of her sister, Margaret Carrigan, the plaintiff. The declaration was in covenant, and set out the policy at length. The defendants filed a plea of "covenants performed, *absque hoc*, with leave to give in evidence the special matter," and several special pleas, alleging—*First*, that the application on which the policy was issued was a forgery; that Mary A. McCaffrey never signed it; *second*, that the insured was in the last stage of consumption at the time the application was made, which represented her to be in robust and perfect health; *third*, that the policy in suit was part of a conspiracy entered into by the plaintiff, the examining physician, and several others, to cheat and defraud the defendant association and others out of large sums of money. The case was tried before Judges McKENNAN and BUTLER, in the United States circuit court, at Philadelphia, October 15, 1885, and a verdict was rendered for the defendants. The plaintiff offered in evidence the policy and proofs of loss, and proved the death of the insured, and there rested. The defendants proved that the signature to the application purporting to be that of Mary McCaffrey was not her genuine signature, whereupon the plaintiff's counsel admitted such to be the fact, but claimed that her name was signed thereto in her absence by one John J. Devlin, who had been told by the insured to sign her name to the application, in case she were not present when it should be presented for her signature. The defendants then offered in evidence the application, which was objected to by the plaintiff, on the ground that a copy of the application had not been incorporated in or attached to the policy; and, in support of this objection, presented and read the following statute, passed by the legislature of Pennsylvania, and approved May 11, 1881.

"Be it enacted, etc., that all life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing

<sup>1</sup> From Insurance Law Journal.

business therein, which contain any reference to the application of the insured, or the constitution, by-laws, or other rules of the company, either as forming part of the policy of contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution, or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The plaintiff contended that under this law the application could not be admitted; that the penalty for a failure to attach a copy of the application to the policy was the absolute exclusion of the application from the case, and was so intended by the legislature. The defendants contended that they offered it for the purpose of establishing or showing fraud, and not as a part of the contract of insurance, though the policy referred to it and made it a part of the contract; that the legislature never intended to shield and reward a fraud, but only that the terms of the policy itself should not be varied or modified by the introduction or admission in evidence of the application, where no copy was attached to the policy.

After argument of counsel, the court rendered the following decision.

*J. Rich. Grier and James M. West, for plaintiff.*

*W. S. Campbell, for defendant.*

BUTLER, J. When this case was previously tried this application was produced, as it is now, for the purpose of proving fraud. I said then it was not necessary to consider (in the view I took of the law) whether the statute is in any case applicable to the trial of a cause in this court. I intimated no opinion or impression respecting it. Since that time this question has been decided, not upon this statute, but upon a similar statute, in New York. The statute is held to be applicable to trial in this court.

The decision of that question, however, now, as it then was, is unnecessary, because the statute, in the judgment of the court, is inapplicable to a case such as this. To my mind, it is plain that the purpose of this statute was to exclude the application where it is not attached to the policy, but is sought to be made a part of the contract, so as to qualify or affect the terms of the policy. It is inapplicable to a case where the purpose is to show, as here, that there was no application made by the insured; that the company was deceived and imposed upon, in the presentation of a paper purporting to be the application of the individual insured, when it was not. No such case was contemplated by the legislature, or there would have been provision to protect a party, under such circumstances, against the use of the application. How could the fraud alleged here, if it exists, be set up in the absence of the paper? Suppose the defendants had undertaken to show, in the absence of the paper, that it was a for-

gery, by calling witnesses who swear they had seen it and knew the handwriting of this girl, and that the signature is not hers? We could not receive it,—the paper must be present and the jury must see it.

McKENNAN, J. The act of assembly says that an application made and not attached to the policy shall not be used in any way to qualify the terms of the contract. But the application is the foundation of the policy,—it rests upon it,—and can it not be shown that the company was procured to issue this policy by the execution of a fraudulent application? It strikes at the obligation of the policy itself. It is not to be regarded as touching the construction of the paper itself, but as to the subsistence of the policy as an instrument binding the company. That seems to be a common-sense construction of the act of assembly.

The application having been admitted in evidence, the defendant's counsel, in view of the admission made by plaintiff that Mary McCaffrey did not herself sign the application, here requested the court to charge the jury, without going further into the evidence, that, as a matter of law, the plaintiff could not recover if the application were signed in the manner set forth in the admission.

---

After a lengthy argument of counsel, the following opinion of the court was rendered by Judge BUTLER, Judge McKENNAN concurring:

BUTLER, J., (*charging jury.*) The plaintiff put in evidence the policy of insurance and proofs of death, and there rested. The defendants, charging that the policy was fraudulently obtained, by means of a paper which, while it purported to be the application of Mary McCaffrey, the assured, was not, but was made and executed in her name by another in her absence, called witnesses to sustain the charge. Among these witnesses was the plaintiff in the suit, who testified that the signature was not Mary McCaffrey's. When the case had reached this situation, the plaintiff's counsel arose and admitted that the paper purporting to be the application of the assured was not signed by her, nor in her presence; stating at the same time that the person who signed it had been told by her that if an application for an insurance was brought to the house in her absence he should sign it for her. Here the case rested. In this state of the evidence the plaintiff, in our judgment, cannot recover. The policy and by-laws of the company require the written application of the assured, embracing answers to various interrogatories, made and executed by her in person. The paper before us, purporting to be her application, was presented to the company, and the policy thus obtained. This (whether designed or not) was a fraud. Upon its face, the policy shows that it was issued in the belief that the paper was



the application of Mary McCaffrey, executed by her in person, containing her answers, over her signature, to the various questions therein propounded; and that such an application is the foundation of the contract between the parties. The company was left in ignorance of the true character of the paper. There is no evidence whatever that either the company or its agent had knowledge of the fact that the paper was other than what it purported to be. Had it been informed of the circumstances,—that Mary McCaffrey had not answered the questions, but that the paper was executed throughout by another in her name,—it may safely be concluded that the policy would not have been issued. The concealment of these circumstances must therefore be regarded as a fraud, rendering the policy void.

It was urged on behalf of the plaintiff that the admission of the paper, here called an "application," is prohibited by the Pennsylvania statute cited, and that it cannot therefore be considered in this connection. If this were true, it is probable the plaintiff's admission above referred to would of itself sufficiently establish the fact of imposition, on which the defendant relies. It is not true, however. The legislature did not contemplate such a case as this, and the statute is clearly inapplicable. The paper here, as we have already indicated, is not an application within the meaning of the statute any more than it is within that of the policy. It is not the application of the assured, except in appearance. It is a deceptive pretense.

While we have admitted the paper in evidence, it is not for the purpose of opening its contents to contestation, but simply as a means of proving that no application, within the meaning of the policy, was made; and that the defendant was fraudulently induced to enter into a contract of insurance without any reciprocal obligation on the part of the assured, as is plainly contemplated in the policy itself.

---

LANCASTER v. PROVIDENCE & S. S. S. Co.

(*Circuit Court, S. D. New York.* February 1, 1886.)

NEW TRIAL—DAMAGES ALLOWED BY JURY INADEQUATE.

In an action to recover damages for personal injuries the verdict should not be disturbed, even though the court may regard it as inadequate, unless something is shown which indicates that the jury were actuated by passion, prejudice, or corrupt motive, or that they made an important and manifest mistake.

Motion by the Plaintiff for a New Trial.

*Edward Russell*, for motion.

*Wheeler H. Peckham*, opposed.

COXE, J. This is an action to recover damages for personal injuries. At the December circuit the plaintiff had a verdict for \$250.

He now moves for a new trial, upon the ground that the damages are insufficient. That the evidence would warrant a much larger verdict is beyond a doubt. Indeed, it may be said that, had the assessment been made by the court, the recovery would have been considerably in excess of the sum awarded by the jury. But the question of damages was for the jury. A wide discretion was allowed them, and the court should be clearly convinced of the rectitude of its position before trespassing upon their peculiar domain. The jury were not called upon to accept the statement of the plaintiff, even though uncontradicted, and there was little else to aid them upon this branch of the case. The attempt to prove the permanency of the injuries by other witnesses was not attended with any marked degree of success. The verdict should not be disturbed, even though the court may regard it as inadequate, unless something is shown which indicates that the jury were actuated by passion, prejudice, or corrupt motive, or that they made an important and manifest mistake. There is nothing here upon which to found such a conclusion. *Walker v. Smith*, 1 Wash. C. C. 202; *Davey v. Aetna Life Ins. Co.*, 20 Fed. Rep. 494; *Muskegon Nat. Bank v. Northwestern Mut. Ins. Co.*, 19 Fed. Rep. 405; *Gilmer v. City of Grand Rapids*, 16 Fed. Rep. 708.

The motion is denied.

---

### SPERRY and others v. SPRINGFIELD F. & M. INS. CO.

(Circuit Court, D. Colorado. January 29, 1886.)

#### 1. FIRE INSURANCE—POLICY—KEEPING NITRO-GLYCERINE ON PREMISES—DYNAMITE OR GIANT POWDER.

The keeping of dynamite or giant powder in a building, without the written consent of the insurance company, will avoid a policy prohibiting the keeping of nitro-glycerine in the building insured.

#### 2. SAME—WAIVER OF PROVISION—PAROL AGREEMENT.

Such a provision in a policy cannot be waived, or in any way affected, by a parol understanding at the time of the application for the policy, even if it is explicit and direct.

#### 3. SAME—CUSTOM AND USAGE.

Such a policy cannot be affected by proof of custom or usage as to the keeping of dynamite or giant powder.

At Law.

*Wells, Macon & McNeal*, for plaintiffs.

*Markham & Dillon*, for defendant.

**HALLETT, J.**, (orally.) Edward A. Sperry and others, partners under the name of "Sperry Bro. & Co.," doing business at Garfield, in this state, brought suit against the Springfield Fire & Marine Insurance Company on a policy issued to them on the twenty-third day of November, 1882, for the sum of \$1,000. The loss occurred in the month of October, 1883, within the life of the policy. The policy, as

originally issued, described only a building used as a store by plaintiffs in the town of Garfield. On the twenty-sixth of March, 1883, the policy was extended so as to cover stock in an adjoining building used by plaintiffs as a warehouse. The agreement in respect to that matter is set up in the answer, and is as follows:

"The portion of the within stock having been moved into the one-story frame building connecting with the original location, this policy is made to cover said stock now in the two buildings connecting."

That is all of the subsequent agreement relating to the stock in the warehouse, so that after this extension of the policy the covenants and agreements, and all the provisions of the policy, must be taken to relate to the warehouse, as well as to the building in which the store was kept, and which alone was specified in the policy as originally drawn. This policy contained a clause, quite usual in such instruments, avoiding the policy if certain things should be done by the insured. Among other things this was specified:

"If the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorous, saltpeter, nitrate of soda, petroleum, or any of its products,—naphtha, gasoline, benzine, benzole, or benzine varnish,—or keep or use camphene, spirit gas, or any burning fluid, chemical oils, without written permission in this policy, then, and in every such case, this policy is void."

The question arises upon the clause so far as it relates to nitro-glycerine. It is fully established in the evidence that there was a large quantity of what is called dynamite or giant powder in the warehouse attached to the main building, and which was brought within the terms of the policy by this agreement of March 26, 1883. If dynamite or giant powder is to be regarded as nitro-glycerine, then the keeping of it was forbidden by this provision of the policy. I understand the position of the plaintiffs to be that it cannot be so regarded; that it is a distinct and separate article from nitro-glycerine, and the policy cannot be avoided unless it was expressly named in the policy as dynamite or giant powder. It appears in evidence, also, and it sufficiently appears also from the definitions given of dynamite, that the effective agent in that compound is nitro-glycerine. I have not found giant powder mentioned in any of the dictionaries or works to which I have been able to refer on that subject. In the edition of 1860 of the American Encyclopedia neither nitro-glycerine nor dynamite are mentioned. In the last edition of the Encyclopedia Britannica dynamite and nitro-glycerine are each mentioned, and something of the history of them is given. *First*, as to nitro-glycerine. It is said here that it was discovered by Sobrero in 1846. Then the elements of it are given, and how it is made, and some description of it:

"The first attempts to utilize the explosive power of nitro-glycerine were made by Nobel in 1863. They were only partially successful, until the plan, first applied by General Pictot in 1854, of developing the force of gunpowder in the most rapid manner, and to the maximum extent, through the agency of an initiative detonation, was applied by Nobel to the explosion of nitro-glyc-

erine. Even then, however, the liquid nature of the substance, though advantageous in one or two directions, constituted a serious obstacle to its safe transport and storage, and to its efficient employment. It was therefore not until Nobel hit upon the expedient of producing plastic solid preparations, by mixing a liquid with solid substances in a fine state of division, capable of absorbing and retaining considerable quantities of it, that the future of nitro-glycerine as one of the most effective and convenient blasting agents was secured. Charcoal was the first absorbent used; eventually the silicious (infusorial) earth known as 'kieselghur' was selected by Nobel as the best material for producing dynamite, (which see,) as it absorbs, after calcination, from three to four times its weight of nitro-glycerine, and does not part with it easily when the mixture is submitted to pressure or frequent alterations of temperature."

Then, in the conclusion of the article, he says:

"The most recent and most perfect form in which nitro-glycerine is now used is called 'blasting gelatine.' This material, also invented by Nobel, is composed of the liquid and of a small proportion of so-called 'nitro-cotton,' which consists chiefly of those products of the action of nitric acid on cellulose which are intermediate between collodion-cotton and gun-cotton. \* \* \* Blasting gelatine is rapidly replacing dynamite in some of its applications, and is already extensively manufactured in different countries."

At the head of this article, the synonyms of nitro-glycerine are "glonoise, glonoise oil, dynamites, blasting gelatine."

In the article entitled "Dynamite" there is some reference to the substances used for compounding them. In this article it is stated that the first application of it was made by Nobel in 1863, who used gunpowder soaked with it for blasting. Then the use of kieselghur is referred to, and further on it is said that "another defect is its liability to part with a portion of its nitro-glycerine especially when in contact with porous substances, such as the paper of cartridges and wrappers; that for the manufacture of dynamite the best absorbents are kaolin, tripoli, alumina, and sugar. The last, like alum, the material employed in Mr. Horsley's preparation, has the advantage of being separable from associated nitro-glycerine by solution in water. Dynamite, as made by M. P. Champion, consisted of 20 to 25 parts of nitro-glycerine with 75 to 80 parts of finely pulverized burnt clay, from glass-works; and, in some explosives sold as dynamite, a mixture of saw-dust and chalk is substituted for silicious substances."

From what is stated here, it is apparent that almost anything which will take up the nitro-glycerine, and hold it until it may be needed for use, in the proportion of one-fourth or one-fifth of the whole quantity, will make an explosive of this kind, and it is quite natural that each manufacturer or each person who may discover a new agent for conveying it should give it a new name, as in this article on "Nitro-glycerine," in this volume of the Encyclopedia Britannica, names are given which are not in use at all in this country. I have looked in the last edition of Webster's Dictionary, and "glonoin," "glonoin oil," and "blasting gelatine" are not referred to at all; and yet, in this article, it is said that blasting gelatine is regarded as the

best form in which it can be used, and the names which are in common use in this country, as giant powder, Atlas powder, and Hercules powder, and the like, are not found in the last edition of the dictionary. All of these substances are of such recent discovery and use that it has only been within a few years that they have come into the books at all. "Dynamite" is not defined in the edition of Worcester's Dictionary of 1870, and "nitro-glycerine" is not in any of the dictionaries to this day. It is only in scientific works and in encyclopedias. That is certainly the first word that was adopted to describe this agent as derived from nitric acid and glycerine, and it seems to me to be perfectly clear that, whatever new names may now be given to the various compounds in which nitro-glycerine is the active and effective force, that they are all well enough described in a policy of insurance by the term "nitro-glycerine."

It is pretty certain that some of these names which are now in use were not known at the time this policy was issued, only two or three years ago. Dynamite was then known, and perhaps was in more general use to describe this substance than nitro-glycerine; but, as nitro-glycerine is the base and the force which is used in this explosive, I think that it must be said that any of these compounds are meant by the use of that name in a policy of insurance; so that the keeping of this giant powder or dynamite, or by whatever name it may be known, in this store-house, was forbidden by this policy.

In that feature it differs from some other cases that were tried in this court, in which judgment was rendered for the plaintiffs, inasmuch as this policy covers the warehouse, and the other policies did not relate to a warehouse. It was thought in those cases that inasmuch as the companies had forbidden the keeping of nitro-glycerine in the store, and had not inserted any provision in the policy as to keeping it near the store, they could not complain of the circumstance that it was kept in a building adjoining the store; but if giant powder and dynamite, as described by the witnesses, are nitro-glycerine, it is directly forbidden by the terms of this policy, and the policy declares that the keeping of such an article will make it void. That is the result, unless there was some permission given at the time of the issuance of the policy which would come within the terms of the clause which I have read. As to that, it is to be observed that the policy provides that these articles are not to be kept without written permission in the policy. It is said that a Mr. Pomeroy, who examined the premises with a view to other policies on the same stock, some time prior to the date of this policy, was notified that dynamite was kept in the store, and that he expressly consented that it should be kept there. There is some question whether he was then acting as the agent, even of the other companies who issued policies at that time, and whether this company can be affected by what he said at that time in respect to keeping dynamite. If, however, this policy is not to be affected by any parol agreement made at the time of the

application for any policy, it is immaterial and not necessary to consider whether he made such an agreement or not. In my judgment, a provision of this kind in the policy cannot be waived or in any manner affected by a parol understanding at the time of the application for the policy, even if it is explicit and direct. In terms, the policy provides that these things shall not be kept without written permission in the policy. On that subject there is a case in 15 Wall. 664, (*Insurance Co. v. Lyman.*) The point decided is not exactly that which arises in the case at bar, but the remarks of Mr. Justice MILLER are to the point:

"Undoubtedly a valid verbal contract for insurance may be made, and where it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a valid recovery as in all other cases where contracts may be made either by parol or in writing. But it is also true that where there is a written contract of insurance it must have the same effect, as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have."

And further on, in the same opinion:

"We think it equally clear that the terms of the contract having been reduced to writing, signed by one party, and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement."

I understand that to be the rule in this class of cases as well as in others. Whatever took place between Mr. Pomeroy and these plaintiffs at the time the negotiations for this policy took place, assuming that he was agent of the company at that time, or at the time of the negotiation for any other policy, is not to be shown in opposition to the express language of the policy.

There was evidence also tending to prove that giant powder and such explosives were kept in stores of this kind in the mining districts, and a custom of that kind was relied on as relieving the plaintiffs from the provisions of the policy. In respect to any such custom, if it prevailed, that also was subject to the rule which obtains in respect to any parol agreement which may have been made affecting the terms of the policy.

In *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, S. C. 3 Sup. Ct. Rep. 207, it is said that "an express written contract embodying in clear and positive terms the intention of the parties cannot be varied by evidence of usage or custom." In *Barnard v. Kellogg*, 10 Wall. 383, this court quotes with approval the language of Lord LYNDBURST, in *Blackett v. Royal Exchange Assur. Co.*, 2 Cromp. & J. 244, that "usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." This rule is based

upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom.

Of course, if the plaintiffs were forbidden to keep this article by the terms of the policy, they cannot bring in a custom or usage as avoiding that prohibition of the policy. If there is any such custom, it cannot prevail against the express language of the policy; and if there was such a custom it could not relate to the quantity which was shown to have been kept on the premises. It was testified by the clerk that there was 400 pounds. Mr. Fulton testified that Mr. Sperry stated that there was 700 pounds. Mr. Sperry, when his attention was called to it, conceded that he had said something about dynamite, but did not admit that he had said it would avoid the policy; but he said nothing as to the quantity, apparently admitting that there may have been 700 pounds. The keeping of such a quantity of so dangerous a substance in such a place as that was a remarkable act of carelessness. It was dangerous to the whole community to have such stuff as that, in such quantity, in a store where people are passing and repassing, and going in and out of the store to trade.

I think plaintiffs are not entitled to recover. The judgment will be for defendant.

---

### HAMMACHER and others v. WILSON.<sup>1</sup>

(Circuit Court, D. Massachusetts. January, 1886.)

#### 1. PATENTS FOR INVENTIONS—LICENSE—JURISDICTION OF FEDERAL COURTS TO ENFORCE OR FORFEIT.

It is undoubtedly the rule that where there appears to be a subsisting license between the complainant and the respondent, the jurisdiction of the court, under the patent law, will not be extended to cover a suit to enforce or forfeit the license on the ground that the terms thereof have been violated; citing *Hartell v. Tilghman*, 99 U. S. 547.

#### 2. SAME—JURISDICTION TO DETERMINE WHETHER THERE IS A LICENSE.

But where a suit is brought for infringement, and the existence of a license is alleged by the respondent and denied by the complainant, it is competent for the court to determine whether, at the time of the filing of the bill, there was a subsisting license between the parties.

#### 3. FAILURE TO PAY ROYALTIES—TERMINATION OF LICENSE.

Defendant failed to pay royalties, and thereupon complainant served notice of termination of the license, in the manner provided by its terms, and afterwards filed his bill for infringement. Defendant sought to excuse his failure to pay royalties on the ground that he could not ascertain where the owner of the patent was when they fell due, offered to pay any sums due under the license, and urged that it ought not to be forfeited. *Held*, that the question to be decided was not whether the license should be declared forfeited, but whether it had already been forfeited by the acts of the parties pursuant to its provisions.

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

4. SAME—AGREEMENT FOR FORFEITURE.

An agreement that, upon failure of a party to a license to perform his covenant, it may be forfeited by a written notice served on him, is valid, and may be enforced. *White v. Lee*, 3 Fed. Rep. 222, 4 Fed. Rep. 916, and 14 Fed. Rep. 789.

5. SAME—EFFECT OF FORFEITURE.

When a license is terminated by service of notice in accordance with its provisions, it ceases thereupon to protect the licensee, and a bill against him for infringement will lie.

In Equity.

*Daniel C. Linscott*, for complainants.

*Ira D. Van Duzee*, for respondent.

Heard by COLT and CARPENTER, JJ.

CARPENTER, J. This is a bill charging infringement of letters patent No. 169,931, granted November 16, 1875, to William F. Ulman, for an improvement in piano-forte pedals. The respondent admits the validity of the patent, and the infringement, but justifies under a license made to him June 1, 1877, by Jacob Ulman, who was then the owner of the letters patent. The complainants reply that the license was revoked and canceled August 13, 1880, by William F. Ulman, who was then the owner of the letters patent, in accordance with the provisions of the license, and on account of failure by respondent to perform his covenants contained therein. This being the state of the controversy, the respondent denies the jurisdiction of the court. He points out that the question whether or not the license has been forfeited is a question arising under the license itself, and not under the patent law, and that this question must be determined for the complainants before it can be determined that he unlawfully infringes the patent; and he claims that this court has no jurisdiction to try that question in a suit for infringement. We find no authority to support this position. It is undoubtedly the rule that where there appears to be a subsisting license between the complainant and the respondent, the jurisdiction of the court, under the patent law, will not be extended to cover a suit to enforce the terms of the license, or to forfeit the license, on the ground that the terms thereof have been violated. *Hartell v. Tilghman*, 99 U. S. 547. But we think that where a suit is brought for infringement, and the existence of a license is alleged by the respondent, and denied by the complainant, it is competent for the court to determine whether, at the time of the filing of the bill, there was a subsisting license between the parties. The court, in *Hartell v. Tilghman*, found as a fact that there was a subsisting license, and on that ground dismissed the bill. The same rule has been followed in other cases. *Cohn v. National Rubber Co.*, 15 O. G. 829; *Kelly v. Porter*, 17 Fed. Rep. 519; *White v. Lee*, 3 Fed. Rep. 222, 4 Fed. Rep. 916, and 14 Fed. Rep. 789.

We proceed, therefore, to consider whether there was a subsisting license between the parties at the date of the filing of this bill. The license contains the following provisions:



"*Fourth.* The said E. Wilson & Co. agree to pay said Ulman, his representatives or assigns, 6 per cent., in money, of the amount of sales during the first four years of said term, and  $6\frac{2}{3}$  per cent., in money, of the amount of sales during the remainder of said term, such payments to be made on the days the accounts of sales are rendered, to-wit: On the first days of January, April, July, and October in each year, and on the last day of the term; but the said E. Wilson & Co. shall not be required to make any return or payment for the time previous to October 1, 1877." "*Eighth.* Upon a failure of either party to perform any of its engagements here entered into, either party, the representatives or assigns of said Ulman, may terminate this agreement by serving a written notice upon the delinquent, but neither party shall thereby be discharged from any liability it may be under to the other, to the said Forbes, the representatives or assigns of said Ulman or Forbes."

The complainants allege that the respondent failed to comply with the terms of the fourth clause, by neglecting and refusing to pay the royalties due in October, 1879, and in January, April, and July, 1880; and that thereupon the license was terminated by written notice, dated August 13, 1880, and served on the respondent. The respondent admits that he failed to pay the royalties at the times provided, and has never paid them; but he alleges that the reason of such failure was that he was unable to ascertain where the owner of the patent was, and that William F. Ulman, the then owner of the patent, had agreed to call on him for such payment, and that he neglected to do so. Much testimony has been taken on these points. The witnesses are in direct conflict in very many particulars, and the questions in dispute have been very carefully and ingeniously argued by counsel. We shall not detail the evidence offered by the parties on these questions. It is sufficient to say that we do not think the respondent has proved that there was any excuse for his failure to perform his contract. On the contrary, we think the evidence shows that, for reasons which seemed sufficient to him at the time, he deliberately determined not to make the payments required by the license. It is true that he has since offered to pay the sums due, and he strenuously contends that his license ought not to be forfeited for mere neglect to pay money, since he now offers to pay whatever may be due. Undoubtedly his argument would be very strong if this were an action to ascertain and declare a forfeiture. The question, however, which we have to decide is not whether we shall now declare the license forfeited, but whether it has already been forfeited by the acts of the parties, pursuant to the provisions contained therein. The respondent agreed that if he failed to perform his engagements, the license might be forfeited by a written notice served on him. We see no reason why such an agreement may not be made and enforced. *White v. Lee, supra.* He has failed to perform his engagements, the notice has been served on him, and we think, on the service of that notice, the license ceased to protect the respondent.

There will be a decree for an injunction and an account as prayed.

GAGE v. KELLOGG and others.<sup>1</sup>

(Circuit Court, N. D. New York. January 18, 1886.)

**1. PATENTS FOR INVENTIONS—VOID REISSUE.**

On rehearing, the decision of the court in this case (23 Fed. Rep. 891) reaffirmed, and *held*, that the claims of letters patent reissue No. 8,615, to William B. Fisher, for improvement in methods and apparatus for treating seeds, are unduly expanded, and are therefore void.

**2. SAME—NEW ELEMENT INSERTED AND CLAIM EXPANDED.**

It does not aid the complainant to show that a claim has been narrowed at one end, when it is apparent that it has been doubly expanded at the other.

**3. PRACTICE—REHEARING.**

It would tend to great confusion and uncertainty in the administration of the law, if a conclusion, reached after mature deliberation, should, upon the same facts, and a repetition of the same arguments, be set aside and reversed by the same tribunal that rendered it.

**Petition for Rehearing.**

*John Dane, Jr.*, for complainant.

*Munday, Evarts & Adcock*, for defendants.

COXE, J. The court rested its decision dismissing the bill in this cause (23 Fed. Rep. 891) mainly upon the unlawful expansion of the reissue, but also upon the non-infringement of the defendants.

Regarding the first claim of the reissue, it was intimated in the opinion that it might be held invalid if construed to cover the use of the apparatus—the mode of operating a machine—the machine being already fully described and claimed. What was said in this regard was intended as a suggestion to counsel upon a point not discussed upon the argument. It was by no means the purpose of the court to convey the impression that, upon this proposition, a conclusion had been reached adverse to the complainant. That counsel should have obtained a different impression is entirely natural, for, upon re-reading the opinion, it is obvious that its language is misleading in this respect, and conveys a different impression from what was intended.

That the second, third, and fourth claims of the reissue are unduly expanded is so clear that nothing further than a perusal of them is necessary. Place them in juxtaposition with the claims of the original, and there is little room for doubt. The demonstration is complete. No attempt was made in the proof to uphold these claims. The subject was wholly ignored by the complainant's expert witness. To hold them valid now would be to disregard the repeated admonitions of the supreme court upon this subject.

Regarding the first, or method, claim, no sufficient reason is advanced why the court should change its decision. It is insisted that the claim is limited by the insertion of an additional feature. Grant it. It does not, however, aid the complainant, to show that it has been narrowed at one end when it is quite apparent that it has been

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

doubly expanded at the other. Considering the claim in its entirety, it will be seen that for "The improved method of cleaning and drying oleaginous seed by feeding the same over the inclined surface of a perforated conical steam-coil, substantially in the manner described," of the original, is substituted: "The herein described method of treating seed, consisting in allowing it to flow downward around a central perforated steam reservoir, and forcing jets of steam from said reservoir outward through the mass of seed, the flow of said seed being regulated by stirrers, substantially as set forth." "The herein described method" is not the method described in the original specification, and the claim is no longer limited to the process of cleaning and drying seed, or to the feeding of seed over the inclined surface of a conical steam-coil.

I have also examined the question of infringement in the light of the argument now addressed to the court, and am constrained to adhere to the former finding. What was said at the final hearing upon all the questions involved, has been reasserted, with, perhaps, additional force; but, practically, the situation remains unchanged, and, after a second review, I see no reason to alter the decision then announced. It would tend to great confusion and uncertainty in the administration of the law, if a conclusion reached after mature deliberation should, in such circumstances, be set aside and reversed by the same tribunal that rendered it. To use the language of the court in *Tufts v. Tufts*, 3 Wood. & M. 429.

"It is hardly in the power of the human mind, surely not of the sound judicial mind, after forming deliberate opinions after long argument and much examination, to change at once its conclusions, merely on a repetition of the same arguments and the same facts. Opinions thus liable to change, would be as worthless after altered as they were before. And hence it is wisely provided, in most judicial systems, as in ours, that where nothing new exists to justify a change in judgment, a general review on the old grounds should be made by different persons, by a higher and appellate tribunal."

The motion for a rehearing is denied.

---

### DRUMMOND and others v. VENABLE and others.<sup>1</sup>

(Circuit Court, N. D. Illinois. November 9, 1885.)

#### 1. PATENTS FOR INVENTIONS—WANT OF NOVELTY.

A claim reading: "As a new article of manufacture, a plug of tobacco one or both faces of which are marked off by indented lines, which serve to secure the wrapper to the filling, and also as guides for cutting up the plug into small pieces of definite size and weight,"—is void for want of novelty, in view of the fact that it was common, prior to the date of the alleged invention, to mark cakes, candies, chocolate, etc., with indented lines to indicate measured quantities.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

2. SAME—INCIDENTAL UTILITY.

A feature of utility which is merely incidental to the main purpose of the invention is not, of itself, sufficient to sustain a claim, where it is shown that the main purpose has been accomplished prior to the date of the alleged invention.

3. SAME—PARTICULAR PATENT.

Patent No. 200,133, of February 12, 1878, to James Drummond, for an improvement in marking plug tobacco, is void for want of novelty.

In Equity.

*Coburn & Thacher*; for complainants.

*Offield & Towle*, for defendants.

BLODGETT, J. This is a suit for infringement of patent No. 200,-133, issued February 12, 1878, to James T. Drummond, for "an improvement in marking plug tobacco." The patentee in his specifications says:

"The object of my invention is to mark plug tobacco in such a manner that the retail dealer can cut the lump into smaller plugs, or pieces of equal and definite sizes, and at the same time the wrapper will be secured to the filling by means of the marks or indentations.

"My invention consists in making the plug of tobacco with a series of indented lines upon its face or faces, which are arranged so as to space off the surface of the plug into subdivisions of uniform and definite size and weight, whereby they become guides in cutting up the plug for retail sales, and which also serve to more firmly secure the wrapper to the filling, so as to prevent the starting of the former from the latter. It is customary in the manufacture of tobacco to make plugs that weigh one pound. Plug tobacco is mostly retailed in pieces of one or two ounces in weight. It is more expensive to make up small plugs of these sizes, and consequently it is desirable to manufacture tobacco in large lumps, and let the retailer cut them up as he sells them. But the seller experiences great inconvenience in cutting the plugs into pieces of just the desired quantity; hence guides are desirable to enable the dealer to cut from a large plug exactly an ounce, or two ounces, or any definite quantity, consisting of the unit of sale, or some multiple thereof. \* \* \* Should any other unit of sale be adopted, or should the plug be of different size, the size of the subdivisions should be varied correspondingly; but the marks are always placed so as to serve as accurate guides in cutting up the large lump. The lines may also be made in each face of the plug, and in fact this is desirable in securing the additional function of the indentations hereinafter specified."

The claim of the patent is:

"As a new article of manufacture, a plug of tobacco, one or both faces of which are marked off by indented lines, which serve to secure the wrapper to the filling, and also as guides for cutting up the plug into small pieces of definite size and weight, substantially as and for the purpose set forth."

The defendant makes tobacco plugs of the same size and general appearance as the complainants, with creases stamped or impressed upon the face of the plug at uniform distances from each other, so that these creases serve as guides in cutting up the plug in measured parts for retailing. The defenses are (1) the want of novelty; and (2) that the defendants do not infringe.

Much of the testimony put into the record bears upon the question whether the complainant was or was not the first to invent and man-

ufacture tobacco plugs marked with indentations to serve as guides for cutting the plug into measured quantities. This testimony is conflicting and contradictory, and, did I feel compelled to dispose of the case upon it, would require careful analysis and criticism; but I am satisfied from the proof that there is nothing new in this device. The proof shows that cakes had been made by bakers for many years before the alleged date of this invention, marked off with indented lines to show how to cut the same in measured quantities or pieces for retail. The same practice had been adopted in the manufacture of chocolate, for the purpose of dividing it into measured pieces for retail; and also in the manufacture of candies. I take it, very few men who are as old as I am, and whose early experience was in the eastern states, will fail to remember the gingerbread peddler, with his cards of gingerbread lined off in spaces where he was in the habit of breaking or cutting it off for the purpose of retailing it to the boys around his stand; and with this fact in remembrance it seems to me it could hardly be invention to simply mark a plug of tobacco so it could be cut off in equal and measured quantities.

The record also shows a patent issued to James Spratt, February 24, 1874, for an "improvement in pressing teas for use," which consisted in pressing the tea leaves into a solid cake with indentations, so that the quantity needed for use at one time could be readily broken off. After this device had been applied to different kinds of goods so as to indicate measured quantities, there could hardly be any invention in applying it to tobacco. But it is claimed there is an element of utility in these indentations, as applied to tobacco plugs, because it is said they serve to fasten the wrapper more firmly to the plug. The proof shows this claim of utility is, at least, doubtful; but even if fully supported by the proof, it is manifestly incidental, and is not the main purpose of the indentation.

I therefore feel compelled to hold this patent void, for want of novelty, and shall dismiss the bill for want of equity.

---

### BUNKER and others v. STEVENS.<sup>1</sup>

(Circuit Court, D. New Jersey. December 11, 1885.)

#### 1. PATENTS FOR INVENTIONS—AGREEMENT TO ASSIGN FUTURE IMPROVEMENTS.

C. & C. contracted with S. to give him the refusal of the purchase of a patent, at any time within a year, for a stipulated price, and, as a consideration for this option, S. agreed that, if he did not so purchase, he would assign to C. & C. any and all improvements upon or relating to the invention described and shown in the patent, which he might make or patent. He elected not to purchase, but refused to assign his improvements claimed to be within the contract, whereupon this bill for a specific performance was filed against him.

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

*Held*, that the contract only contemplated and covered improvements made within the year therein specified.

**2. SAME—CONSTRUCTION OF PATENT—ROCKING AND TILTING CHAIRS.**

The distinction between a tilting and a rocking chair—that the former takes its motion from a single point or pivot, and the latter from an axis which is continually changing—recognized as “a well-defined difference” between them; and the M. D. Connolly patent of December 19, 1876, construed, and *held* to cover a tilting-chair, whose seat and occupant are supported by a central spiral spring, interposed between and connecting the upper and lower parts, but not a chair in which the weight of the occupant is sustained by rockers resting on base supports.

**3. PRACTICE—COSTS, WHEN ALLOWED.**

Costs are always awarded to the successful party, unless there has been something in his conduct which renders such a course inequitable and unjust to the losing side.

**4. SAME—COSTS REFUSED ON ACCOUNT OF DEFENDANT'S CONDUCT.**

In this case the defendant had written various letters, in the hope of an advantageous business arrangement, suggesting that his improvements, patented and unpatented, related to the Connolly patent, which induced the complainant to purchase the interest of C. & C. in the contract; but he afterwards assumed a different ground. *Held*, in view of these letters, so written and acted on, that he should not be allowed to recover costs.

**In Equity.**

*Banning & Banning*, for complainants.

*J. E. Maynadier*, for defendant.

NIXON, J. On December 19, 1876, letters patent No. 185,501 were issued by the patent-office to M. Daniel Connolly and Thomas A. Connolly, for improvements in tilting-chairs. One Asher B. Stevens, being desirous of manufacturing, at his own risk and expense, for a limited period of time, the improvements shown and described in said letters patent, and also of securing the right or option of purchasing the same within such limited period, at a stipulated price, afterwards, to-wit, on the twenty-sixth of August, 1879, entered into an agreement with the patentees to the following effect:

(1) That the Connollys should license and empower Stevens to manufacture and sell, within the period of one year from the date of the agreement, at his own risk, cost, and expense, the improvements described and claimed in said letters patent, for the purpose of testing their salability, and the feasibility of their introduction to the public; and to enable him to recompense himself for the expense incurred in manufacturing and introducing the said improvements, they granted to him the right, within the said period, to make and sell 500 chair-tilts, embodying the said improvements, free from all royalty or license fee; but upon every tilt above the number of 500, the royalty or license fee due and payable should be 15 cents each, payable monthly. The said Connollys gave to Stevens the refusal of the purchase of the said letters patent, at any time within the one year, at the stipulated price of \$1,000. (2) And the said Stevens agreed to have immediately manufactured, at his own cost and expense, a sufficient number of complete tilts, embodying the patented improvements, to test their salability, and to pay the said royalty of 15 cents for every tilt manufactured by him above 500, and further covenanted that if he did not purchase and pay for the said letters patent within one year from the date of the agreement, as before provided, he would, at the expiration of the year, cease from the manufacture of said tilts, and would turn over and surrender promptly to the Connollys all patterns gotten up by him for the manufacture of tilts, embracing the said

improvements, and would assign to them the entire right, title, and interest in any and all improvements upon the invention shown and described in said letters patent, or relating thereto, which he might make or patent.

On the sixth day of June, 1884, the Connollys assigned unto the above-named complainants, and their legal representatives, the said agreement, and all manner of right, interest, benefit, and advantage whatsoever of the said Connollys thereunder, together with the right of suit or action in respect of the same, and all the rights and powers whatsoever necessary or incidental thereto.

The bill of complaint, filed in this case, requires the defendant to fully disclose, but not under oath, "the number, nature, and extent and details of the various improvements in spring attachments included in and by the said agreement with the Connollys, and, where applications for patents have been made, to authorize the commissioner of patents to furnish complainants with copies of the same, to account with and pay to the complainants all the gains, savings, and profits which he has made or realized from the manufacture and sale of the improvements included in said agreement, together with all the damages sustained by complainants from his unlawful acts; to execute to complainants good and sufficient assignments or conveyances of certain letters patent No. 273,630, issued to the defendant, March 3, 1883, the application serial No. 11,702, now pending, the four other applications pending, and the two applications in preparation,—all mentioned in defendant's letter to complainants of March 31, 1884,—and any and all other improvements, patents, and applications embraced within the letter and spirit of said agreement; and that he may be enjoined from making or selling, through himself or others, any improvements upon the invention shown and described in the said Connolly patent of 1876, or relating thereto; and from selling, assigning, mortgaging, or otherwise incumbering any of said improvements; and from making any contracts or granting any licenses in relation thereto, and abandoning or otherwise throwing the same upon the public, or doing anything to impair or destroy their value, or impede, damage, or injure the complainants in the possession, enjoyment, exercise, or use of the said improvements."

The defendant's answer is brief. Annexing thereto a copy of the contract set forth in the bill of complaint, he admits that he duly executed the same, and alleges that, shortly before the expiration of one year from its date, he notified the Connollys that he did not wish to purchase the patent, and that he was ready and willing to fulfill all his obligations to them arising under the said contract; that thereupon there arose a dispute between them as to what the defendant was bound to do under its terms, the Connollys insisting that he was obliged to assign to them certain inventions which defendant claimed were not within the contract; and that he has ever been and is still ready to do and perform every act and thing lawfully required of him thereunder.

The present controversy arises from the failure of the defendant, at the end of the year, to assign and set over to the complainants certain improvements which it is alleged he had made during the year, and since, upon the invention shown and described in and relating to the Connolly patent, and it is to be determined by the consideration of three questions: (1) What is the meaning of the contract? (2) What is the true construction of the Connolly patent? (3) What are the improvements or inventions of Stevens, which the complainants claim?

1. It was insisted by the counsel of complainants, at the hearing, that the proper interpretation of the agreement gave to the complainants not only the patterns and the improvements upon the invention shown and described in the Connolly patent, which Stevens made or patented during the year, but also all improvements that he should make or patent after the expiration of the year. I cannot assent to this construction. The fair import of the language used is that only those improvements should become the property of the complainants which were made upon the invention or patented before the termination of the contract.

2. The Connolly patent is for an improvement in tilting-chairs, as contradistinguished from rocking-chairs. There is a well-defined difference between them. The former take their motion from a single point or pivot, and the latter from an axis, which is continually changing. The patentee in his specification says that the essence of his invention consists in the application or employment of a spiral spring in such a manner that it will afford a support to the seat; being compressed, wholly or in part, when the seat is occupied, and opening or expanding on one side when the latter is tilted or rocked. He further states that his "invention does not consist in the construction of the spring, but rather in its combination and arrangement, together with means of preventing tilting in undesirable directions. Hence the first and characteristic claim of the patent is for a tilting-chair, having its seat and base connected through the medium of a spiral spring, which constitutes the only intermediate connection and support between the seat parts and the base parts; said spring being arranged with its longitudinal axis in a vertical line, so as to permit the seat to yield and tilt, substantially as shown and described." Assuming that the patentee knew what he had invented, we find no support, in their specifications, to the broad claim of the complainants' counsel, on the argument at the hearing, that the patent covers all chairs which have a short, broad, stiff, spiral spring. In view of the state of the art, and of patents previously granted, to give it such a construction would probably render it invalid. It undoubtedly includes a chair whose seat and occupant are supported by a central spiral spring interposed between the seat frame and the base; the said spring connecting the parts together by having its respective ends securely fastened, but not a chair where the weight of the occupant



is sustained by rockers, and where the only function of the spring is to impart the tilting motion. There is no hint in the patent that the inventor had in his mind the application of the spiral spring to a base-rocking chair, or that his object was to make any improvement upon such chairs. His whole thought seems to have been engrossed in improving tilting-chairs.

3. With this construction of the complainants' Connolly patent, it follows that the inventions which the defendant has patented, or filed applications for patents, are not improvements upon the invention shown and described in the Connolly patent, nor do they relate thereto. They refer to improvements upon chairs with a base and rocker, where the weight of the occupant is supported by the rocker, and not upon tilting-chairs where the support is derived from the spring. In the hundreds of patents issued for all sorts of devices to be applied to tilting and rocking chairs, it is quite difficult to determine what is new and what is old; but there are two classes clearly defined, the tilting and the rocking, and the complainants' patent belongs to the first class, and the defendant's improvements to the second. From the evidence in the case, I am not willing to find that the defendant has not always tendered himself willing to comply with his covenants in the agreement, and the bill of the complainants must be dismissed.

I have doubts about the question of costs. They are always awarded to the successful side, unless there has been something in the conduct of the party which renders such a course inequitable and unjust to the losing side. The letters of the defendant, exhibited in the testimony, have made a very unfavorable impression on my mind. In his correspondence with the complainants, before they acquired an interest in the contract, these letters were certainly suggestive that his improvements, patented and unpatented, belonged to the Connolly patent. He was then hoping to make an advantageous business arrangement with the complainants. It is true that after these negotiations failed, and the complainants, induced probably by his previous statements, had purchased the interest of the Connollys in the contract, he assumed a different ground; but, under the circumstances, he ought not to be allowed costs, and the decree of dismissal will not carry costs.

**BENSLEY, Trustee, v. NORTHWESTERN HORSE-NAIL Co. and others.<sup>1</sup>**

(Circuit Court, N. D. Illinois. January 11, 1886.)

**1. PATENTS FOR INVENTIONS—WHEN EMPLOYER MAY USE IMPROVEMENTS MADE BY EMPLOYEE.**

The improvements covered by the second and fourth claims of letters patent No. 162,789, of May 4, 1875, for machines for finishing horseshoe nails, were made while the inventors and patentees were in the employ of the defendant company, under agreements whereby said company acquired the right to use all improvements made by complainants, and applicable to its nail-finishing machines, and hence complainants cannot demand compensation for such use.

**2. SAME—PREPONDERANCE OF EVIDENCE.**

Against the testimony of one of the complainants, that he had not agreed his employer might use his improvements, was opposed the testimony of two equally credible and disinterested witnesses, one of whom had made a written entry or memorandum of the agreement on an occasion when it was assented to by complainant. *Held*, that the preponderance of evidence was in favor of the employer.

**3. SAME—PRESUMPTIONS FROM RELATIONS OF EMPLOYER AND EMPLOYEE.**

Where the patented improvements were developed and perfected at the sole expense of an employer, by employees who received extra pay on account of their known ability as inventors, *held*, that these facts, standing alone, made a very strong case in favor of the right of the employer to use such improvements without further compensation.

**4. SAME—NOVELTY—INFRINGEMENT.**

Although this case is expressly decided on other grounds, the court had grave doubts whether Armstrong was the inventor of the three-part die covered by the second claim of the patent, and whether the bow-spring shown in and covered by the fourth claim of the patent was infringed by the combined centering device and ejector used by the defendant.

**In Equity.**

*Offield & Towle*, for complainant.

*Coburn & Thatcher*, for defendant.

BLODGETT, J. This is a bill for an injunction and accounting for an alleged infringement of patent No. 162,789, granted May 4, 1875, for an "improvement in machines for finishing horseshoe nails." The patent in question contains six claims; but only two of those claims, the second and fourth, are in controversy in this case. These two claims cover what is known in the patented machine as the "shearing die," by which the nails are trimmed or pointed, and a spring which operates between the cutting surfaces of the die to aid in ejecting the nail from the die after the shearing has been done. Several defenses are interposed: (1) That the devices in question were invented and put in use by the patentees, Armstrong and Hutchinson, while they were in the employ of the defendant company, under a contract that the company should have the benefit, not only of their skill as mechanics, but of their abilities as improvers of the machinery used by the defendant; (2) that the devices in question are not patentable, for want of novelty; (3) that they had been in public use for

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

more than two years prior to the application for this patent; (4) that the defendants do not infringe.

The proofs show that, in the early art of making horseshoe nails by machinery, the head of the nail was shaped, and the shaft drawn out flat to about the required size and length; but the nail was afterwards finished—that is, straightened, pointed, and beveled—by hand, usually by the blacksmith who used them. Later on, machines were devised for straightening, sharpening, and beveling by machinery. At the time Armstrong entered the defendant's employ, in July, 1873, the defendant was using finishing-machines which had been devised and patented by Harry A Wills, and had employed Wills to supervise the running of these machines, and make further improvements upon them. Wills' machines then in use contained a device for rolling—that is, straightening, shearing, and beveling—the nails in one combined mechanism.

The contention of the defendant as to the first defense is that in the month of July, 1873, the patentee Daniel Armstrong went into the defendant's employ, with the understanding that his time was to be devoted to assisting Wills in the running and operating of the finishing-machines which Wills had constructed, and were then in operation in defendant's factory; and also to the making of such improvements thereon as his ingenuity and inventive genius might conceive or suggest; that in consideration of the scope of his employment, and that the defendant was to have the benefit of whatever improvements he might make upon the defendant's machines, Armstrong was to be paid higher wages than were usually paid to men who were employed to do the work of supervising the mere running and operation of such machines; that a skilled mechanic, competent to merely superintend the running of such machines, could be employed for from \$3 to \$3.50 per day, while the wages of Armstrong, in consideration of the benefits to defendant of his inventive ability, were to be \$4.50 per day. As to the patentee Hutchinson, it is contended that he had been for many years in the employ of the defendant company, prior to the date of the patent in question, in the capacity of foreman of the machine or repair shop, and that, about the time of Armstrong's employment, Hutchinson's wages were advanced from \$4 to \$5 per day, with the understanding that defendant should have the benefit of whatever improvements he should make upon their horseshoe-nail machinery.

The proof as to this portion of the defense rests mainly in parol, and consists—*First*, of the testimony of A. W. Kingsland, who was secretary and treasurer, and who seems to have been the general manager of the business of the defendant company at the time Armstrong was employed, and during the time he continued in the defendant's employ. He testifies as follows:

*“Answer.* It was a few days prior to the sixteenth day of July, 1873, that Mr. Armstrong was in the office of the company, and I said to him that Wills' finishing-machines—we believed it to be correct in principle, but were de-

fective in their mechanical operation; that Wills had more than he could attend to in operating the machines and improving them, and I thought we would like to employ such a man as he was; that we wished a man to grind the dies and operate the machines, and to take hold with Mr. Wills, and aid him in improving and perfecting them. I believe Mr. Armstrong told me that he was then in the employ of Mr. Sturgis, of the concern now known as 'The Chicago Stamping Company,' and was getting three dollars and a half a day. I offered him four dollars per day. He replied that if he gave us the benefit of his inventive talent he thought he ought to have more pay. I inquired how much he thought he ought to have. He replied he thought he ought to have four dollars and a half per day. I answered: 'We will give you four dollars and a half per day, with the understanding that we are paying for your hands and your brains, and that any improvement that you make in horseshoe-nail finishing-machines, while in our employ, applicable to our machines, shall belong to the company.' To this he assented. Within a day or two after, Mr. Armstrong was again in the office, and Mr. G. L. Smalley, the then superintendent of the company, was also present, and I repeated to him, in Mr. Armstrong's presence, the agreement as above stated, to which Mr. Armstrong again assented."

Again, in answer to question 25, Mr. Kingsland says:

"I made no written memorandum at the time Mr. Armstrong was engaged. Along in the spring of 1874, some of the workmen about the factory advised me that Mr. Armstrong was getting up a new finishing-machine. As I presumed some of the improvements which he had made on our machines might be embodied in his new machine, I thought it would be well to remind him of the agreement between us, and see if we understood it alike. The second day of April, 1874, I was in the finishing-room of our factory. Said to Mr. Armstrong: 'I see you are putting some things on our machines which you claim to be your own invention. I suppose you remember the agreement between us. We have the right to use all such improvements, and they belong to us.' He replied: 'Certainly, you can use these improvements, or my entire plan, for finishing horse-nails.' Of this conversation I made a memorandum in writing, on the second day of April, 1874, within half an hour from the time the conversation took place."

Kingsland produced his memorandum book, in which, under date of April 2, 1874, is written:

"Armstrong gave A. W. K. [A. W. Kingsland] consent to alter pointing-machines to use his plan. Demanded no pay for same. Told Wills of this, same day.

[Signed]

"A. W. KINGSLAND."

George L. Smalley, who was the superintendent of the defendant's factory at the time Mr. Armstrong was employed, testified as follows:

"Shortly before Mr. Armstrong's commencing work for the company, being in the office of the company, Mr. Kingsland and Mr. Armstrong being present, Mr. Kingsland called my attention, and stated to me, in the presence of Mr. Armstrong, that he had agreed with Mr. Armstrong to go to work for the company, and assist in running and improving the finishing nail-machines we were then using, and that he was to assist Mr. Wills in perfecting and improving those machines, and that the company should have the right to use all such improvements made and applied or applicable to those machines; in short, that we employed, and had the right to the use of the product of, his hands and his brains. He says: 'Mr. Armstrong, is that correct,' and Mr.

Armstrong said: 'Yes,' and I will commence work next week or on Monday.' And the price was to be four dollars and a half per day."

The testimony of Kingsland as to the terms and scope of Armstrong's employment is, to some extent, corroborated by the evidence of Wills, who stated that, about the time Armstrong entered the employ of the company, Kingsland informed him of the nature of the duties which he expected Armstrong to perform, and at one time, while Armstrong was in the employ of the defendant company, in discussing some improvements which Armstrong was making upon the Will's finishing-machines, Armstrong said: "We could put in the bow-spring, or anything else he [Armstrong] had on the machine." Wills also corroborates Kingsland's statement that he called Wills' attention to the conversation noted in Kingsland's memorandum book, the same day the entry was made.

As to the defendant's version of the terms of the contract with Hutchinson, the evidence rests wholly on the testimony of Smalley, the superintendent, who testifies:

"Sometime previous to the great fire of 1871, while the company's factory and shop were at the corner of Canal and Monroe streets,—the exact year I cannot state,—I employed him to work in our repair-shop as a machinist. Soon after that, he was given charge of our repair-shop as foreman, and continued so up to the time of his leaving the employment of the company, his wages having been advanced from time to time, until soon after the employment of Mr. Armstrong, at which time we were paying him the sum of four dollars per day. At that time he was engaged in superintending our repairs, and working upon improvements in our nail-machines. At that time he said to me one day that he thought, in view of the improvements that he had made and was making to our machines, he thought he ought to have an increase of wages. I asked him what wages he thought he ought to have, and he said that he thought he ought to have five dollars per day. I told him I thought that was a large increase, but I would think of it, and let him know soon. Either that day, or the day following, I said to him that in consideration of his giving the company his best services in the invention and construction of improvements for our nail machinery, that I would consent to give him five dollars per day, the company to have the right to use all such improvements as he had made or should make or could make, applicable to our machines, and he agreed thereto, and the increase of wages commenced at the beginning of the week following this agreement, and the company continued to pay him that price from that time until he left the employ of the company. *Question.* Did Mr. Hutchinson make some improvements to machines used by your company, besides finishing-machines, and, if so, did the company have the right to use those improvements on their machines without further pay to Mr. Hutchinson, and did they so use them without any demand from him for any pay additional to his wages? *Answer.* He did make some improvements upon our forging-machines, without demanding or claiming any other pay than his wages, and such improvements were used by the company."

On the part of the complainant, the testimony is met by a flat denial by Armstrong and Hutchison that they, or either of them, ever made such an agreement as is testified to by Kingsland and Smalley; and the only question is as to where the preponderance of proof upon this branch of the case rests.

I have no difficulty in concluding, as to Armstrong, that the preponderance rests upon the side of the defendant, for these reasons: *First*, there is nothing in the record showing, or tending to show, that Kingsland or Smalley are any the less truthful or reliable or intelligent witnesses upon the subject-matter than Armstrong, and they certainly have no greater interest in the case than he has; and, as against Armstrong, we have the clear, unequivocal, explicit statement of two witnesses against his denial; and this explicit statement on the part of Kingsland is somewhat corroborated by the written entry made in his memorandum book, which would seem to entitle it to credence as against a mere naked denial, however positive, of Mr. Armstrong. The testimony in the case also shows that Armstrong was known to the defendant company, prior to his employment, as an inventor or improver upon horse-nail machines; that he had made certain improvements upon what was known as the Dodge forging-machine used by the defendant, on which he had obtained patents, and for which the defendant was paying him a royalty at that time. Armstrong, therefore, came into the employ of the defendant with a known reputation and character as an inventor of this class of machinery, and it is but natural to suppose that the manager of the defendant company, in stipulating for his employment, would have stipulated that it should include whatever inventions or improvements he might make upon their machinery; and we find that, immediately upon entering into the employment of the defendant, Armstrong was placed in charge of the Wills finishing-machines, acting under the supervision of Wills, and that very soon afterwards he made changes and alterations in some of the Wills machines, among which was the introduction of the three-part die and the bow-spring, covered by the second and fourth claims of the patent. These devices were undoubtedly put into the Wills machines as the result of consultations with Wills, and as improvements upon the Wills machines, because Wills, being the inventor of those machines, and having the general supervision of their working in defendant's factory, it is not probable that he would have consented to Armstrong's modifications without fully understanding those modifications, if not contributing something to them by his own suggestions. It is not natural to suppose that a man like Wills, who, from the character of machines he had devised, must have had inventive talent of a high order, would have stood passively by, while Armstrong was making these improvements upon his machines, and not contributed something to them by aiding in adapting, if he had nothing to do with originating, the new die and spring.

This shearing die and clearing spring were mere improvements upon devices before that time in use, and well known in this class of machines for accomplishing the same result. Shearing dies were old, and "pushers," or means for ejecting the nail from the die after it had been sheared, were old. All that Armstrong did was to sub-

stitute what he claimed was a new form of die in place of the dies before that time used, and a spring pusher for one that was moved by the power that worked the machine; and subsequently, when Armstrong and Hutchinson organized and developed the elaborate machine for finishing horseshoe nails covered by their patent, these two devices, which had been in use in the Wills machine, were carried into their large machine, and covered by the second and fourth claims of their patent. So that we have clearly a case of the development and perfecting, by practical experience and labor, of the elements of the two claims of the patent in controversy, at the sole expense of the defendant, and under such circumstances as, even if standing alone, would make a very strong case in favor of the right of the defendant to use them, and these facts go far to suggest and support the conclusion that Armstrong and Wills were working together in a common employment in putting these new dies and springs into the Wills machines, with the understanding that the defendant was to have the benefit of this improvement. It must be borne in mind that Armstrong was working upon the Wills machines, and that he was seeking to make them more effective for the performance of the work of the defendant; and it was not until the manager, Kingsland, learned that Armstrong and Hutchinson had devised a complete machine, differing in many respects from the Wills machine, upon which they contemplated obtaining a patent, that he called Armstrong's attention to their contract, of which he made the memorandum of April 2, 1874.

As to the scope of Hutchinson's employment, the proof stands upon the testimony of Smalley for the defense, and the denial of that testimony by Hutchinson. But I find much corroboration of the testimony of Smalley in the circumstances of the case: Hutchinson's employment by the company; the advance of his wages to the sum of five dollars per day at about the time Armstrong was employed; the fact that he had made no demands upon the company, and taken out no patents for improvements he had already made in the machinery of the defendant; and the further fact that, so far as is disclosed in this testimony, whatever may have been the part taken by Hutchinson in devising the general features and characteristics of the machine covered by their patents, he would seem to have taken little or no part in contriving or putting into operation the die and spring in controversy in this case which were first developed and perfected in the Wills machine. It seems to me more probable that Armstrong and Wills, both experienced inventors, especially in this class of machinery, devised these dies and springs in their experiments for improving Wills' machines; and when the large machine covered by the patent was conceived, this die and spring was carried into it, on the assumption that Armstrong had invented it.

For these reasons I feel impelled to the conclusion that the employment of Armstrong and Hutchinson by the defendant was such as to

preclude them from making any claims against the defendant for the devices now in controversy. It would seem, from the testimony in the case, that when Hutchinson and Armstrong had completed the drawing of their invention, and applied for their patent, they made a demand upon the defendant company for royalties for the use of their machines, and in the discussion growing out of this demand the defendant company asserted, not only a right to use the machines, but the ownership of the patent. The controversy in this case, however, necessarily involves only the question of the right of the complainants to demand compensation of the defendant for the use of this patent, and does not involve the ownership of the patent as between the defendant and the complainants.

Taking this view of the first point made by the defense, it is, of course, unnecessary to consider the questions of novelty, prior use, and infringement; but I may, I think, with entire propriety, say that, upon the testimony, there is room at least for grave doubt whether Armstrong was the inventor of the three-part die covered by the second claim of the patent, and whether the bow-spring shown in and covered by the fourth claim of the patent is infringed by the combined centering device and ejector used by the defendant. The bow-spring shown in the patent operates only as an ejector. Wills' pusher performed the same function, and the bow-spring only differed from it in working by its own elasticity instead of from the power that drove the machine. But I wish it understood that I do not decide the case on this point, but upon the proof of defendant's right to use these features of the patent under the agreement set up.

The finding will be that the defendant has the right to use the second and fourth claims of complainants' patent.

---

### FLORSHEIM and another v. SCHILLING.<sup>1</sup>

(*Circuit Court, N. D. Illinois.* January 11, 1886.)

#### 1. PATENTS FOR INVENTIONS—CORSETS.

Letters patent No. 238,100 corsets, and No. 238,101, elastic gore or gusset for wearing apparel, granted February 22, 1881, to Simon Florsheim, as inventor, and Thomas H. Ball, as assignee, are void for want of patentable novelty over the English patent to John Mills, of March 14, 1815; the English patent to Miller, of December 31, 1866; and the American patent to Mary J. C. Van Norstrand, of February 1, 1876.

#### 2. SAME—MECHANICAL SKILL.

Patent No. 238,100 claimed a corset having elastic side sections comprising two layers of cloth, stitched together transversely so as to form tubes, wherein were inserted, in groups, spiral metal springs, formed of one continuous spring, and such sections having plain margins or edges for uniting the elastic sections to the non-elastic sections of the corset. The prior pat-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.



ents, taken together, disclosed this construction, except that they did not show an elastic section composed of groups of spiral metal springs. *Held*, that no invention, but only mechanical skill, was required to group such springs.

3. SAME—CHANGE OF MATERIAL.

The substitution of one material (metal for India-rubber springs) is not a patentable difference, even where a superior article is produced by such substitution.

4. SAME—COMPLETE DEVICE NOT SHOWN IN SINGLE PRIOR PATENT.

Although the complete devices described in these patents may not be found in any one of the prior patents, yet enough is shown in the Miller (1866) patent to invalidate them.

In Equity.

*Coburn & Thacher*, for complainants.

*Wm. Zimmerman, West & Bond* and *J. C. Chumasero*, for defendants.

BLODGETT, J. The complainants, by this bill, seek an injunction and accounting for the alleged infringement by defendant of patent No. 238,100, granted by the United States to Simon Florsheim and Thomas H. Ball, February 22, 1881, for a "corset;" and letters patent No. 238,101, granted to the same parties, on the same date, for an "elastic gore or gusset for wearing apparel;" the invention in both patents appearing to have been made by the complainant Florsheim, and the patent issued to himself and Ball.

No. 238,100 is for a corset constructed with an elastic section extending from the top to the bottom, the mode of construction and advantages of which are explained in the specifications as follows:

"The corset is composed of two separable parts, A, B, which are secured together at the front, as usual, by studs and loops, and at the back have eyelets for receiving lacings. The central sections, C, D, at the sides of the corset, which extend from under the arms down over the hips, instead of being made as usual, are constructed of two layers or thicknesses of cloth, or other material, which thicknesses are sewed or woven together, a portion of their width to form horizontal tubes, which receive and cover small, closely-coiled, spiral springs of metal. The pieces of cloth from which the sections, C, D, are formed, are considerably wider than such sections when completed, so that when puckered latterly they will be of the desired width. The tubes are located in the center of the sections, and do not extend to the edges of the same, so that margins will be left at the ends of the tubes, which margins are lapped with the adjoining sections of the corset, and stitched thereto. The springs are arranged in groups, as shown, with puckered spaces of cloth between such groups. The number of springs composing the groups will vary, according to location, so as to give the requisite stiffness and elasticity. Thus, at the top and bottom of the elastic side sections, the groups of springs should not be made so stiff as at the waist of the corset. The springs are passed through the tubes, which are puckered over the springs to the desired extent. The springs terminate at the ends of the tubes, and are secured to the thicknesses so as to leave clear margins of unpuckered cloth outside of such springs. This is a great advantage, since it enables the elastic sections to be stitched into the corset on a sewing-machine, which cannot be well done when the ends of the spring are secured by the same stitching, since the needle strikes the coils of the spring, and either cuts the spring or breaks the needle. Herein, also, is one of the peculiar advantages over rubber cloth. Rubber cloth, when stitched into a corset, always has more or less of the rub-

ber cords cut off by the needle, and it is thus greatly weakened, while in my corset the elasticity of the sections cannot be affected by the stitching.

"The cheapest manner of arranging and securing the groups of springs, to secure the above advantages, is by making all the groups of each section from a single, continuous length of metal spiral spring. The spring is secured at its upper end by stitches, passed through the thickness at the end of the upper tube, and inclosing one or more coils of the spring. The spring is then passed back and forth through the tubes, which are puckered at the same time. After forming one group, the spring extends down between the thicknesses to the next group, and so on, till the lowest group (or the uppermost group, as the case may be) is finished, when the spring may be cut off, if there is more than required, and will be secured by stitches passed through the thicknesses. The elastic section can then be placed in the corset; the plain margins being lapped with edges of the adjoining sections, and secured by lines of machine stitching. By having the elastic sections in the sides of the corset, the corset can adapt itself to different forms without the use of other elastic sections or gores, and such elastic side sections, by extending the entire length of the corset, from under the arms down over the hips, allow the front and back of the corset to expand and contract from these central side points, independently of each other, and more easily and freely than when a back elastic section is used."

This patent has three claims, which are as follows:

"(1) In a corset, an elastic section composed of two thicknesses of cloth or other material, *a*, *b*, having tubes, *c*, in combination with the spiral metal springs, *E*, inclosed by such tubes, and arranged in groups to regulate the elasticity of the section; such groups being all composed of a single continuous spring passed back and forth through the tubes, and secured at its ends, substantially as described and shown. (2) An elastic section or gore, composed of material having tubes extending only part way across the same, and plain margins outside of said tubes, and spiral metal springs arranged in groups in such tubes, the springs of the several tubes being made continuous, substantially as described. (3) A corset, laced at the back, and having the elastic side sections *C*, *D*, extending from under the arms down over the hips, each of such sections being composed of material having puckered tubes extending part way across the same, and plain margins outside of said tubes, and spiral metal springs arranged in groups in such tubes, and made continuous, substantially as described and shown."

Patent No. 238,101 is for an elastic gusset or gore for wearing apparel, and describes a gore or gusset made by forming tubes in the central portion of two strips of cloth or leather, laid together by stitches, or by weaving such tubes into the cloth fabric, into which tubes spiral metal springs are run, so as to draw or pucker the central portion of the cloth or leather, thereby making the central portion of the cloth elastic to the extent of the elasticity of the spring, leaving a non-elastic end, edge, or margin, by which the gore or gusset can be fastened into the garment where it is to be used. This patent has four claims, all covering a gore, gusset, or section for wearing apparel, constructed, as described, of metal springs inclosed in a covering material, and puckered over such springs; the springs not extending to the edges of such covering, and being stayed at their ends in the tubes.

The defenses are: (1) That there is no patentable novelty in either of these inventions; (2) that the defendant, Gustav Schilling, was the first inventor of the device in question, instead of the complainant Florsheim.

The English patent of John Mills, of March 14, 1815, shows elastic sections or gores in corsets made of cloth, with tubes stitched into the same, into which are inserted metal spiral springs so as to pucker the cloth over the springs, and give the sections the required elasticity. The patentee in his specification says:

"Fig. 1 is a representation of a stay composed of the same material as common stays, with the introduction of an elastic or expansive portion or slit down the middle, which will dilate or expand by a more than ordinary force or pressure being exerted, as in the case of breathing or exercise of the arms. This flexible portion is composed of springs either of brass, copper, or iron wire, or of any other matter or thing capable of producing sufficient elasticity; but this which I recommend is small brass wire worm-springs, which extend by a small degree of force. These I place close together, in runners or spaces stitched in between two pieces or layers of silks, satin, or other fit material, puckered or quilted loosely, to give room for expansion; the ends of the springs, and their covering of silk, satin, or other matter on them sewed or otherwise fastened to and between the two half pieces of the stay previously made of the usual material."

Here we have an elastic section for a corset, the elasticity being secured by spiral springs transversely set into the material of which the section is made, and this section extending from the top to the bottom of the corset, either at the back or front or both.

In the American patent granted February 1, 1876, to Mary J. C. Van Nostrand, a corset is shown with elastic sections at the sides, extending from under the arms to the hips or bottom of the corsets, this section being made of elastic webbings, the elastic material being presumably India rubber. The elastic sections of this corset are located in the same place, and perform the same function, as those shown in the complainant's corset.

In the English patent to Miller, of December 31, 1866, elastic gussets suitable for use on boots, stays, and for other purposes are described, where the elastic material used is India-rubber strips run continuously back and forth in tubes formed in the cloth. The patentees say:

"According to our invention, we secure the vulcanized India-rubber springs between two pieces of woven fabric, leather, or other material by stitching with the sewing-machines,—the stitches running in parallel lines, and passing through the two pieces of fabric or material, between the India-rubber springs,—and the springs, in place of being each a separate piece, are in one piece. The length of vulcanized India-rubber cord at the end of each traverse across the gusset being turned around, and caused to return parallel to itself, thus the liability of the India rubber to slip and work out of the gusset is much reduced. *When gussets made in this manner are worked into boots or other articles, the stitches by which they are secured are passed through a margin on each side of the gusset, and not through the India-rubber part of the gusset, as heretofore.* \* \* \* We first cut the material, leather, silk, cotton,

or any other woven fabric, and the lining, to the size required of the gusset when it is finished, *and for leaving the required margin.* We then turn over the top edge, and baste or tack it down to the lining. We then commence to stitch, with a sewing-machine, a series of rows in parallel lines transversely across the gusset; the stitching passing through the two materials, commencing at the top, and so on from row to row, until the whole of the gusset is stitched. The distance between the rows of stitching will depend on the thickness of the India-rubber thread to be inserted."

They then describe the manner in which they pucker the cloth and a machine for doing puckering, and proceed:

"We then insert with the bodkin or needle the thread or strand of India rubber, which is in one length. We commence at the top cavity to insert the India-rubber thread or cord, and follow back in the next row or cavity, causing it to return parallel to itself, and so on, the same from row to row, until the whole of the cavities are filled with India rubber. *We then pull back the margin, that is left as large as required, and tack it down with an ordinary needle, and the gusset is ready for use.*"

There can be no doubt that there is described in this patent a gusset with non-elastic margins, edges, or ends, and the only conceivable difference between this device and the elastic sections in the complainants' corset patent is that an India-rubber spring is used instead of a metal spiral spring, and the springs in this English patent are not grouped. This patent seems to fully instruct any person how to make a section like the section shown in the complainants' corset patent with India-rubber springs. It does not seem to me that there is any patentable difference between the gussets described in the English patent of Miller and the sections in the complainants' corset patent. The substitution of one material for another is not a patentable difference, even where a superior article is produced by such substitution. *Hotchkiss v. Greenwood*, 11 How. 248; *Hicks v. Kelsey*, 18 Wall. 670; *Terhune v. Phillips*, 99 U. S. 593.

In the corset patent the patentee gives his reasons for grouping the springs. He says:

"The springs are arranged in groups as shown. \* \* \* The number of springs composing the group will vary according to location, so as to give the requisite stiffness and elasticity. Thus at the top and bottom of the elastic side sections the groups of springs should not be made so stiff as at the waist. It is essential, also, that these springs be arranged in groups, since, if placed contiguous throughout the elastic sections, the corset would be much too heavy and expensive, and such sections would be too stiff at some points, and not stiff enough at others."

Here is a mere mechanical reason for grouping these springs, clearly applicable to the change of material and the use to which the gusset or section is applied. Were a good mechanic to attempt to apply the Miller gusset or gore to a corset, in the manner shown in the complainants' corset patent, where an unequal degree of elasticity is required at different points, there can be no doubt that he would

provide for that inequality of elasticity by placing his rubber springs closer together or further apart, which would not require inventive ability, but mere mechanical skill or adaptation. With the art of corset-making so far developed in the direction of complainants' device, as is shown by the elastic sections of Mills and Van Nostrand, and with the Miller section showing continuous springs and non-elastic margins, it would seem that all complainant did in his corset patent was fully anticipated in the older art. The substitution of wire for rubber makes the Miller gusset in all respects an elastic section, such as is shown in complainants' corset, except that the springs are not grouped, and this is not a patentable difference, as the only advantage of the grouping is to make the section less rigid at some points than at others.

As to complainants' gusset or gore patent, it seems to me that all the elements of this patent are found in the English patent, (the Miller,) just considered. The only difference is the material of the springs, and that, I have already said in the discussion of the first patent, is not a patentable difference. Miller's patent shows a gusset with tubes, into which the springs are inserted, and upon which the cloth or gusset material is puckered, and margins for attaching the gusset to the garment where it is to be used or applied. The old Mills patent of 1815 showed a gusset with metal springs inserted in tubes, and the cloth puckered over those tubes, so as to provide for the expansion. But the patent did not expressly provide for a plain or a non-elastic margin, and all that Miller did in 1866, over Mills in 1815, was to put a non-elastic margin upon the Mills gusset; and all that Florsheim did was to substitute metal springs in place of the rubber springs shown in the Miller patent. This cannot amount to invention in the then state of the art. Coiled wire springs for a gusset or gore were old, and gussets with non-elastic margins were old, and well known long before Florsheim applied for his patent; and the proof shows that he examined the Miller patent before he applied for the patent now under consideration, so that he must have known that the field was already covered before his device was produced.

It is urged on the part of the complainant that the complete device as described in each of these patents is not found in any one of the older devices; but, as I have already said, I find enough in the Miller patent alone to meet and anticipate both these patents. When Miller had shown how to make an elastic gusset or section for wearing apparel with non-elastic margins, there was no invention in applying such a gusset or section to a corset, when corsets had already been made with elastic sections, although these older sections did not have non-elastic margins, as it did not require invention to put Miller's elastic sections into Mills' or Van Nostrand's stays.

There is a large mass of testimony in the case bearing upon the questions involved in the second point of the defense; but, under the

view I take of the question of novelty, it is unnecessary for me to consider this testimony.

A decree may be prepared finding the complainants' patent void for want of novelty, and dismissing the bill for want of equity.

### ADAMS & WESTLAKE MANUF'G Co. v. RATHBONE and others.<sup>1</sup>

(Circuit Court, N. D. Illinois. January 11, 1886.)

#### 1. PATENTS FOR INVENTIONS—DEFENSE OF WANT OF PATENTABILITY.

It is quite common for those who are appropriating the result of another's labor or inventive genius to attempt to belittle the device so appropriated, and insist that it required no exercise of the inventive faculty to produce it; but where the device went into general use upon the issuing of the patent, and marked the point between failure and success, the invention is established.

#### 2. SAME—NOVELTY—OIL-STOVES.

A patent for an oil-stove having the chimneys fixed between two plates, so as to make the single structure readily movable as a whole, to facilitate the placing of the chimneys over the burner for the purpose of cooking or heating, or removing them for cleaning, trimming, or filling the lamp, the oil-pot forming the base of the stove, and the chimney being removable, is not anticipated by a gas and oil-stove having an upper and lower plate, with the oil-pot slid in between them.

#### 3. SAME—PRIOR USE—EVIDENCE OF.

It is sufficient, to defeat a patent, to show that the device covered by it has been in public use or on sale for more than two years prior to the application for a patent; but the party asserting such a defense assumes the burden of proof, and is bound to sustain it by clear and convincing testimony.

#### 4. SAME—INSUFFICIENT EVIDENCE OF PRIOR USE.

Proof as to the use of alleged prior devices, resting wholly in the recollection of persons who claimed to have seen or used them about 20 years before, and where none of such devices were produced, is too unreliable to form a safe basis for judicial action.

#### 5. SAME—ABANDONED EXPERIMENTS.

Where it was not shown that more than one of each of the alleged prior devices was ever made, and these were not produced, but were testified to from memory 20 years after, *held*, that these instances of use were to be properly classified as abandoned experiments.

#### 6. SAME—MITCHELL PATENT, No. 96,249, OF OCTOBER 26, 1869—KEROSENE STOVES.

The first claim of this patent is infringed by oil-stoves having top and bottom plates with chimneys held between them; and although such stoves have a drum or casing surrounding the chimneys, this is a mere addition, and does not change the combination covered by this claim.

#### 7. SAME.

The second claim of this patent, in view of the prior state of the art, must be limited to projections cast or raised upon or as a part of the surface of the plate for holding the cooking utensils, and such claim was not infringed by the oil-stoves of defendants involved in this suit.

In Equity.

*Coburn & Thacher*, for complainant.

*Offield, Towle & Phelps* and *M. D. Leggett*, for defendants.

BLODGETT, J. This is a bill to restrain the alleged infringement of letters patent No. 96,249, granted to R. B. Mitchell, October 26,

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

1869, for "an improvement in kerosene stoves," and for an accounting. The chief feature of the invention covered by this patent consists in holding the chimneys between upper and lower plates, so that the lower plate rests directly over the burners, and in fact, as a general rule in construction, contains the cones of the burners of the kerosene lamps, while the upper plate furnishes facilities for holding the cooking utensils. The upper plate also contains projections extending upward, which sustain the cooking vessels above the tops of the chimneys, so as to allow the heated air and products of combustion to pass out from under the cooking vessel without obstruction. The patent contains four claims, but only the first two are in controversy in this case, which are as follows:

"(1) The combination of the chimneys, J, and the plates, D and K, when constructed and arranged in a kerosene stove, substantially as and for the purposes specified and shown. (2) The projections, O, on the upper surface of the plate, K, in combination with the chimneys, J, in a kerosene stove, when constructed and arranged substantially as and for the purposes specified."

In the specifications and drawings, the plate, D, is the bottom or lower plate of the chimney section, as it is called, and the plate, K, is the upper plate or top of the section.

The defenses relied upon are: (1) That the patent sued upon shows no proper subject-matter of invention or patentability; (2) that the patent is void for want of novelty; (3) that the device covered by the patent had been in public use for such time before the patent was applied for as to make the patent void; (4) that the defendants do not infringe.

As to the first defense. It is quite common for those who are appropriating the results of another's labor or inventive genius to attempt to belittle the device so appropriated, and insist that it required no exercise of the inventive faculty to produce it; but when we consider the state of the art at the time this inventor entered the field, as shown by the proofs in this case, it is quite evident that no one had hit upon the Mitchell idea of fastening the chimneys between the two plates, and utilizing the upper plate as a stand on which the cooking utensils were to be placed; and when the Mitchell patent had instructed the world as to the especial adaptation of this arrangement to the purposes of oil-stoves, it seems to have gone into general use. That it was new when Mitchell entered the field seems to me to be abundantly and clearly shown by the proof in this case. That it is useful the defendants can hardly be heard to deny so long as they appropriate and use it in substantially the exact form in which Mitchell produced and describes it. It may seem now to have been but a small matter to have fastened the chimneys between these two plates, but I gather from the proof that doing it marks the point between failure and success in this class of devices.

As to the second point. That the patent is void for want of novelty

a very large number of anticipatory devices are put into the record; but, after a careful study of them, I do not find in the proof anything which can be fairly said to exhibit the peculiar form of construction shown in this patent. What Mitchell did was to fix his chimney between the two plates, so as to make the single structure readily movable as a whole to facilitate the placing of the chimneys over the burner for the purpose of cooking or heating, or removing them for cleaning, trimming, or filling the lamp. That he secured a compact and readily adjustable apparatus for utilizing coal-oil as a cooking fuel is abundantly shown by the proof in this case; and while some of the older devices appearing in the testimony show upper and lower plates, or top and bottom plates, in none of them do I find anything which suggests the Mitchell device, or gives direction how to make it. It is a part of our common knowledge that the top and bottom plates of the ordinary cooking or box stove had been used for many years prior to this patent; but that does not, it seems to me, defeat the arrangement which Mitchell contrived and applied to a coal-oil stove. The difference between this and the McDougal gas and oil stove, which is much relied upon by the defense, is that McDougal's bottom plate is below the oil-pot, and the oil-pot, when an oil-lamp was used, had to be slid into the stove between the upper and lower plates, while, in Mitchell's device, the oil-pot forms the base of the structure, and the chimneys are removable therefrom.

The defense as to prior use, for a time sufficient to defeat the patent, has involved the examination of an immense mass of conflicting, and what, at first, seemed wholly irreconcilable, testimony. The instances of prior use relied upon are the Rogers stove, used at South Boston in 1861; the Robinson stove, used in Boston in 1863; what is called "The Condon Exhibit," said to have been used at Chicago in 1865; and the "Stevens & Thorpe Exhibit," said to have been produced and brought into use in Chicago in 1866. It is sufficient, to defeat a patent, to show that the device covered by it has been in public use or on sale for more than two years prior to the application for a patent; but the party asserting such a defense assumes the burden of proof, and is bound to sustain it by clear and convincing testimony. "Prior use must be proved beyond any fair and reasonable doubt." *Coffin v. Ogden*, 18 Wall. 120; *Campbell v. Mayor, etc.*, 20 Blatchf. 67; S. C. 9 Fed. Rep. 500; *Hawes v. Antisdel*, 8 O. G. 685; *American Bell Telephone Co. v. People's Telephone Co.*, 22 Fed. Rep. 309.

As to the Rogers and Robinson stoves, the proof rests wholly in the recollection of persons who claim to have seen or used these stoves about 20 years before they testified. They do not produce the stoves, nor show that more than one of each kind was ever made; so that, aside from the unsatisfactory nature of testimony resting in the "slippery memory of men" for 20 years or over, these instances of use may properly be classed as abandoned experiments. At all events,



such testimony seems to me too unreliable to form a safe basis for judicial action. The time fixed by the testimony as to the use of these Rogers and Robinson stoves was in the very infancy of the efforts to utilize coal-oil as a cooking fuel, and it seems to me improbable that a man who had made a stove so nearly perfect, and adapted to meet a want which the inventors of that day were endeavoring to supply, would have stopped with the production of a single stove. Especially is this applicable to Robinson, who says in his testimony that he is an experimenter and inventor in the field of oil stoves and heaters.

The "Condon" and "Stevens & Thorpe" stoves are involved in a much larger and more contradictory mass of testimony than the two just considered, and the question is, does the proof in regard to these show a public use or sale of either of these stoves for more than two years before the Mitchell patent was applied for?

*First*, as to the Condon stove. Michael Condon testifies, in substance, that he was foreman in the jobbing department of Cross, Dane & Westlake's factory, in Chicago, in 1865; that W. B. Billings was there experimenting with oil-stoves; and that, under Billings' direction, he constructed a chimney section for an oil-stove like Exhibit Condon, and that subsequently, and during the year 1865, he made chimney sections with cast-iron top and bottom plates holding the chimneys between them by a rod like the defendant's Exhibit Thorpe & Stevens Stove; and the testimony of Condon is to some extent corroborated by the testimony of the witnesses Dane, Sargent, Strathern, McGuire, and Weinberg. It will be noticed that all these witnesses testify only from recollection, and the Condon Exhibit is simply produced by him from recollection, and is but an illustration of what he thinks he remembers having produced under Billings' direction at the time mentioned; and while they say in a general way that these stoves were on exhibition at the Sanitary Fair held in Chicago in June, 1865, and were sold there and at the factory, none of them know of any sales being made, and none of them ever sold any, and no purchaser is produced who bought and used one or more of them; and I think the better, and in fact only reasonable, conclusion is that all that Condon did was in the way of aiding Billings in his experiments, and that no stoves for sale or use were made at Cross, Dane & Westlake's factory in 1865 with chimney sections like the Thorpe & Stevens Chimney Section Exhibit, or the Condon Exhibit; and my reasons for so concluding are, briefly, these: Billings was an inventor of a coal-oil stove which was covered by his patent of January 17, 1865, and which he called "The Union Oil-stove." In the latter part of the winter or early spring of 1865, he made an arrangement with Cross, Dane & Westlake to make these stoves under a license from him, and he had general supervision of the work in the factory on those stoves. This was an oil-stove without a chimney, and was the stove which Billings exhibited at the Sanitary Fair. At some time

after he came there, Billings began experiments with a chimney stove, and finally, in the fall of the year 1865, he constructed what he called his "Tripod Stove," which, as near as I can gather from his description, was made with chimneys suspended in what he calls a "diaphragm," which was a sheet-metal plate holding the chimneys by the top or upper ends, and this diaphragm was held inside a ring, to which three legs were attached, so as to set the frame or tripod over the lamp, and bring the chimneys over the burners. That Mr. Condon, under Billings' direction, made some experimental structure, and possibly something like the Condon Exhibit, may be true; but I am satisfied they were only mere experiments, for the reason that Billings was an inventor. He had already had one stove covered by a patent, and Cross, Dane & Westlake were working under a license to use that patent by a contract with Billings, and were manufacturing stoves in accordance with it for sale upon the market; but Billings was seeking also an improvement upon what he had already done, and the proof shows that in November of the year 1865 he obtained another patent for an oil-stove with no chimney; and it is not reasonable to suppose that if he had, during the summer of 1865, brought his experiments with a chimney stove to a successful result, or had made chimney sections with top and bottom plates like the Condon or Stevens & Thorpe Exhibits, he would not have also covered, or at least sought to cover, this device by a patent. That Cross, Dane & Westlake made, during the early part of the year 1865, a large number of the Union oil-stoves is undoubtedly true; but in the light of the testimony, especially that connected with the sale of their entire stock of oil-stoves in October, 1865, to the Kerosene Lamp Heater Company of New York, I am satisfied that they never made for sale any oil-stove like the Stevens & Thorpe Exhibit or the Condon Exhibit; but if anything approximating in form or construction to either of those exhibits was made by Mr. Condon, under Billings' direction, they were mere experiments, and were not considered as completed, nor put into use. And this conclusion is confirmed by the fact that, in the large stock of oil-stoves and fixtures sold and delivered by Cross, Dane & Westlake to the Kerosene Lamp Heater Company, no device like the Thorp & Stevens Chimney or the Condon Exhibit or the Tripod Stoves were found, which justifies me, I think, in holding that whatever devices in the direction of a chimney stove were made in the year 1865 at Cross, Dane & Westlake's, were taken possession of and retained by Billings as his special property, and considered by him as mere experiments, and were not considered a part of the manufactures of the firm.

I have no reason to assume that Dane, Condon, and the other witnesses who testified as to what was done in 1865 have intentionally testified falsely as to the facts stated in their depositions. I think they are mistaken as to the time when they first saw the chimney sections with top and bottom plates holding chimneys between

them. The subject of improvements in oil-stoves was undoubtedly a topic of interested discussion among the workmen in the shop where so much of that kind of work had been done as was done at Cross, Dane & Westlake's in the spring and summer of 1865, and when the Stevens & Thorpe chimney section was produced at a later date, they probably saw it; and as these men knew Stevens, and were naturally interested to examine and remember what he had accomplished, they have by the lapse of time become confused as to dates. Billings states unequivocally that he never saw a chimney section like the Stevens & Thorpe Exhibit until it was shown him by Stevens in 1866; and when we bear in mind that he was, of all these witnesses, the one most interested in improvements in this class of devices, I think his recollection is much more reliable than that of Condon and Dane as to when such chimney sections were first seen in Cross, Dane & Westlake's shop. It is no reflection on these men's truthfulness when I say I am satisfied they did not see a chimney section like the Thorpe & Stevens Exhibit until after Stevens had made one in the fall of 1866 or spring of 1867, as it is so easy for men to be mistaken as to dates. Inventors like Billings are not in the habit of conceding to others devices which they themselves originate, and it is absurd to assume that if Billings had produced a chimney section like the Stevens & Thorpe Exhibit, in 1865, he would have conceded it to be Stevens' invention, as he does in his testimony. The most that Billings says he did was to produce a Tripod stove, and he lays no claim to the "Stevens & Thorpe" chimney section, but says directly and expressly that Stevens did that.

I now come to consider the testimony relating to what was done by Stevens & Thorpe and Parke in the way of producing an oil-stove, substantially like that covered by Mitchell's patent, prior to August, 1867. It appears from the proof that the relation between Billings and Cross, Dane & Westlake, in the construction of oil-stoves, closed in the fall of 1865, when the latter firm sold out their stock of oil-stoves to the Kerosene Lamp Heater Company; but, for more than a year afterwards, Billings seems to have been actively engaged in some other shop or place of business in selling rights to use his patents, and in making improvements upon oil-stoves. At some time, apparently after he closed his connection with Cross, Dane & Westlake, he entered into some contract or relation with James H. Thorpe and a Mr. Parke, the son-in-law of Thorpe, by which Thorpe and Parke were to sell territorial rights to make, sell, and use oil-stoves under Billings' patents; and I think it is fairly deducible from the evidence that the idea of adding a chimney to the Billings device was acted upon either by Billings himself, or by him and Thorpe and Parke together, and in the fall of 1866 this purpose took a practical shape by the employment of Stevens, who was then working at Baldwin's shop at 210 Lake street, to make some chimney sections. I think there can be no doubt from the proof that Stevens did some

work on this device in August or September, 1866, while at Baldwin's, and that their experiments in that direction were continued in the spring of 1867, after Stevens had gone into the employment of B. L. & O. S. Chamberlain; and the result of what was done by Stevens under the direction of Billings, Thorpe, and Parke in the fall of 1866, and the spring and summer of 1867, was the production of a stove substantially like the Stevens & Thorpe Exhibit. Billings says that he sold out his entire interest in his patent and the oil-stove business in the spring of 1867, and I think it may be assumed from the proof that the idea of inclosing the chimneys in a drum, and filling the drum with plaster of paris, was quite fully worked out and put in a practical form in the early summer of 1867; for in June, 1867, an order was given the firm of Ingalls, Sylla & Perkins, of Elgin, for a lot of castings for what would seem to be about 100 completed stoves of the style shown as the Seymour Exhibit; and about the tenth of September, 1867, Thorpe appeared at the Scott county fair held at Davenport, Iowa, with two stoves, one like the Seymour Exhibit and one like the Butler Exhibit, and these stoves were used and exhibited by Thorpe at this fair, and afterwards used by Seymour in Davenport. My conclusion from the testimony of Stevens is that he made no stoves to be put on the market and sold by Thorpe and Parke or by Billings, but that the object was to get up a stove which would enable them to sell territorial rights under the Billings patents, and perhaps under other patents which they contemplated obtaining. Stevens says repeatedly, in the course of his testimony, that the parties were experimenting; for instance, at page 125, vol. 1, Defendant's Record, he says:

"The stoves made, varied in construction at different times; in other words, we were experimenting a part of the time. C. Q. 59. Who do you mean by 'we'? A. I refer to Billings, Thorpe, Parke, and myself; more especially to Thorpe and myself."

It seems quite palpable to me, from the evidence of Mr. Stevens, that himself, Thorpe, and Parke were at work, through the summer of 1867, getting up an elaborate stove like the Seymour Exhibit, not for the purpose of putting it on sale as a common article of merchandise, but as an illustration or sample stove for the purpose of enabling them to sell territorial rights. What they wanted, and were evidently seeking to obtain, was an attractive oil-stove that would, at least, appear to be useful and practicable, and which would make their patent salable.

There is no proof in the record showing, or pretending to show, that Billings, Stevens, Thorpe, or Parke sold a stove, or had one in public use, like the Seymour or Butler Exhibits, during the spring or summer of 1867. I conclude from the proof that the first public exhibition they made of this stove was at the Davenport fair, in September, 1867. The case as made in the proofs is to my mind a clear one of different inventors, working contemporaneously at the same de-

vice, and arriving at substantially the same results at nearly the same time. Mitchell testifies that he had his device fully perfected, as covered by his patent, in the spring of 1867, having begun his experiments in the spring or early part of 1865, but was too poor to apply at that time for his patent, and did not do so until August, 1869. Stevens, Thorpe, and Parke, perhaps, with some suggestions from Billings, began in the same line of experiments in the fall of 1866, and got their stove out ready to place before the public in the month of September, 1867; but, as already said, I find no proof in the record that they put their device, as shown in the Seymour and Butler Exhibits, into public use or on sale, or that they can be said to have brought their experiments to a successful result, until the month of September, 1867, at which time Mitchell had applied for his patent. Thorpe and Parke did not intend to go into the manufacture or sale of oil-stoves. All they wanted was a few stoves to exhibit to help them sell rights, and hence it is not probable that they would offer stoves for sale, except in exploiting their patents, and in connection with efforts to sell territorial rights. Thorpe is described in the evidence as a dealer in patent-rights, and it was undoubtedly to aid him in this business, and not as a manufacturer or vendor of oil-stoves, that the stoves made by Stevens were got up. Therefore, while, as I have said, the testimony is unusually conflicting and contradictory, I have had no difficulty, after a careful study and analysis of it, in finding that the proof does not defeat this patent by showing that the device covered by it was in public use and on sale for more than two years before the Mitchell patent was applied for.

As to the question of infringement. There can be no doubt from a mere inspection of the defendant's stoves, which are stipulated in the case as exhibits, that they have the construction called for and covered by the first claim of the Mitchell patent. They have the top and bottom plates, with the chimneys held between them. Although they also have a drum or casing surrounding the chimney, that is a mere addition, and does not change the combination shown in Mitchell's patent.

I think the proof shows that devices for holding cooking utensils above the tops of the chimneys had been in use before the commencement of Mitchell's experiments in 1865, and I must therefore hold that the second claim of the patent for projections, O, on the upper surface of the plate, K, must be limited to projections cast or raised upon the surface of the plate, K, or cast as a part of the upper plate itself; and within this limitation I think that, under the proof, this claim may be sustained; and none of the defendant's stoves show the use of these projections constructed and applied substantially as described in the patent. I therefore find that the patent is valid, and that the defendants infringe the first claim thereof, and that complainant is entitled to an accounting for profits and damages.

ADAMS & WESTLAKE MANUF'G CO. v. EXCELSIOR OIL-STOVE MANUF'G CO.<sup>1</sup>

(Circuit Court, N. D. Illinois. January 11, 1886.

1. PATENTS FOR INVENTIONS—MITCHELL PATENT, No. 96,249, OF OCTOBER 26, 1869—KEROSENE STOVES.

This patent sustained, following *Adams & Westlake Manuf'g Co. v. Rathbone*, ante, 262, and defendants held to have infringed the first and second claims.

2. SAME—ADAMS PATENT, No. 221,206, OF NOVEMBER 4, 1879—OIL-STOVES.

The third claim of this patent sustained, and found to have been infringed by defendants.

3. SAME—ADAMS PATENT, No. 230,850, OF AUGUST 10, 1880—OIL-STOVES.

Defendant having used the same device as shown in patent No. 85,373, of December 20, 1868, to A. H. Emery, they do not infringe the second claim of the Adams patent.

In Equity.

*Coburn & Thacher*, for complainant.

*Offield, Towle & Phelps* and *M. D. Leggett*, for defendants.

BLODGETT, J. The plaintiff, by this bill, seeks an accounting and injunction for an alleged infringement of patent No. 96,249, granted to R. B. Mitchell, October 26, 1869, for "an improvement in kerosene stoves," and patent No. 221,206, granted November 4, 1879, and patent No. 230,850, granted August 10, 1880, both to J. McGregor Adams for improvements in oil-stoves.

What I have said in the preceding case of *Complainant v. John F. Rathbone*, in regard to the first-named patent, makes it unnecessary to further discuss that patent in connection with this case, as the infringement is clearly shown in this case, both as to the first and second claims of that patent, under the view which I have taken of that patent in the former case, as defendants in this case use, not only the upper and lower plates and chimneys covered by the first claim, but they also use the projections cast upon the upper plate for the purpose of supporting the cooking utensil above the tops of the chimneys.

As to the last-named patents, infringement is charged as to the third claim of patent 221,206, and the second claim of patent No. 230,850. Patent No. 221,206 has reference to the oil-pot or oil reservoir of a kerosene stove, and shows what is called a "Supplementary Plate" extending over the upper surface of the oil reservoir, and resting upon a bead or ridge raised upon the upper surface of the upper plate of the oil-pot, held in place by a thumb-screw which fastens this plate firmly to the upper plate of the reservoir, which supplementary or auxiliary plate carries the wick tubes. The language of the third claim is as follows:

"An oil reservoir, A, provided with a projecting top, in combination with a loose supplementary plate, D, to which the wick-tubes are attached, and a

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

thumb-screw, D', by which the plate is secured to the top of the oil reservoir, substantially as described."

Patent No. 230,259 is for a safety device, in connection with the oil-pot, by constructing the filling tube with wire-gauze or perforated sheet-metal, so that if the oil or vapors inside of the filling tube takes fire, it will not communicate the fire to the body of the oil in the reservoir, and this filling tube is also provided with a tubular stopper, B', across which is a diaphragm of perforated metal or wire-gauze, which would allow the escape of the volatile gases from the filling tube; the language of the second claim being:

"A tubular stopper, B', fitted to the filling apperture, and provided with a perforated diaphragm, N, in combination with the perforated safety tube, A, substantially as and for the purposes specified."

An inspection of the defendant's stove, as shown in the proof, shows an auxiliary or supplementary plate over the oil reservoir in connection with each wick-tube; these plates performing for each wick-tube, and the reservoir over which the several wick-tubes are placed, precisely the same office as is performed by the larger plates, D, in the complainant's patent; and I have no difficulty in concluding, from an inspection alone, that the defendant's stove infringes this claim of the Adams patent of 1879; and, although the novelty of this patent is questioned in the pleadings, and some proof of anticipatory devices is put in the record, I do not find anything which anticipates or should defeat the Adams patent for this supplementary plate, D. I therefore find that the defendant infringes the third claim of the patent of 1879.

But the proof shows in a patent, granted December 20, 1868, to A. H. Emery, a stopper to a filling tube, with, so far as I am able to see, the same device used by defendants; that is, a stopper with one or more gauze diaphragms. I therefore find that the device covered by the second claim of the Adams patent of 1880 is anticipated by the Emery patent, and that the Adams patent of 1880 is void for want of novelty as to the second claim.

The finding will therefore be that the defendant infringes the first and second claim of the Mitchell patent of 1869, and the third claim of the Adams patent of 1879, but does not infringe the Adams patent of 1880.

PHOENIX CASTER CO. v. SPIEGEL and others.<sup>1</sup>

## TUCKER and others v. OGBORN and others.

(Circuit Court, D. Indiana. January 28, 1886.)

## 1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM.

The combination covered by the patent in question accomplished no new result in mechanics, and differed from previous known combinations only in the construction of one or two of the parts, whereby, perhaps, a better but certainly not a different kind of result was accomplished than had been before effected. *Held*, that the patent must be limited to these details of construction.

## 2. SAME.

When an applicant for a patent acquiesces in the decision of the patent-office, that the novelty of his device consists merely in an improved construction of details, the claim cannot, by a liberal construction, be made to include anything else.

## In Chancery.

C. P. Jacobs, for complainants.

C. H. Burchard and Parkinson & Parkinson, for defendants.

Woods, J. The action in each of these cases is for infringement of letters patent No. 190,152, granted May 1, 1877, to Alexander C. Martin, for "improvement in furniture casters," the plaintiffs claiming title by virtue of certain assignments of the patent. The infringement charged against Spiegel & Co. consisted in the possession and sale of an article known as the "Yale Caster," made at New Haven, Connecticut. The complaint against Ogborn and the Richmond Caster Company, in the other case, is for the manufacture, use, and sale of casters made under letters patent No. 273,278, granted March 6, 1883, to the Richmond Caster Company, as assignee of Ogborn.

Besides disputing the plaintiffs' title to the Martin patent, the defendants in each case deny infringement, and also the validity of that patent. The prior art, also, is shown by reference to numerous earlier patents, both American and English, which it is alleged anticipated the Martin combination entirely; or, at least, in so far as to impose upon it a strict construction, limiting it to the particular arrangement of parts described, and excluding any pretense of infringement by the defendants.

After a painstaking consideration of the evidence and accompanying models, the opinions of the experts, and the arguments and briefs of counsel, which upon both sides have been quite exhaustive, I am compelled to the conclusion in each case that infringement has not been shown, and consequently that the bills must be dismissed. The combination of the patent in question accomplished no new result in mechanics, and differed from previous known combinations, designed

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.



for the same and like purposes, only in the construction of one or two of the parts, whereby, perhaps, a better but certainly not a different kind of result was accomplished than had been before effected. More than this cannot be justly claimed, as it seems to me. Besides, it appears that Martin's application for a patent was rejected and withdrawn two or more times; the examiner insisting, upon certain references, "that all applicant's novelty in entire device was expressed only by words 'as specified.'" In obedience to this ruling the claim, and perhaps the specifications, was modified, and the patent granted. It follows that the patent cannot now, by a liberal construction, be made to include anything so denied by the patent-office; and without this, the devices of the defendants cannot, I think, be said to infringe.

Bill in each case dismissed.

---

YODER v. MILLS and others.

(Circuit Court, E. D. Pennsylvania. October 23, 1885.)

PATENT LAW—INVENTOR HAS THE MERIT, NOT THE MACHINIST.

He who conceives the device must have the merit thereof, and enjoy the profit, not he by whose mechanical skill the conception was, at the inventor's request, put into tangible form.

In Equity.

*William A. Redding*, for complainant.

*M. Daniel Connolly*, for respondents.

MCKENNAN, J. The subject of this suit is a patent to Lorenzo T. Yoder for an invention relating to the manufacture of candy, dated December 4, 1883, and numbered 289,488. The patent contains four claims, but no evidence is produced to show any infringement of the first two. The third and fourth claims are the only ones touching which there is any contest. They are both for combinations of mechanical devices, and differ only in that to the elements specified in the third claim is added a "cover, A," of peculiar construction; and thus the fourth claim is constituted. Nor is there any substantial controversy between the parties upon the question of infringement. It is clear that the machine made by the defendants is, in every essential feature, identical with that described in the patent.

The only contested inquiry in the case involves the right to the invention itself. All the evidence exhibited relates to it. Both parties claim the merit which the patent apparently accords to the complainant, and, without discussing the evidence, it is enough for us to say that, in view of the decided preponderance of the proofs, it is justly devolved upon him. The conception of the invention belongs

to him, and all that the defendants contributed was the necessary mechanical skill, furnished at his request, to embody it in an operative form. He did not lose the merit which is due to inventive suggestiveness, and devolve it upon the mechanic whose only function was to materialize it. *Watson v. Bladen*, 4 Wash. C. C. 582; *Blandy v. Griffith*, 3 Fish. 609.

But some doubt may be entertained as to the right of the complainant to appropriate the combination covered by the fourth claim of the patent, treating it as an entirety. The cover, A, which is an indispensable constituent of the combination, was not devised by him, but was suggested and constructed solely by one of the defendants. Whether that claim, then, is enforceable against the defendants we do not deem it imperative on us to decide. We will therefore adjudge that the patent is valid in so far as the *third* claim is involved, that an injunction issue against the infringement of that claim, and that the profits or damages accruing from the past infringement thereof be ascertained by a master; and a decree will be prepared accordingly.

---

### WOOSTER v. THORNTON.<sup>1</sup>

(Circuit Court, S. D. New York. January 26, 1886.)

#### 1. PATENTS FOR INVENTIONS—PRACTICE BEFORE THE MASTER.

There had been an interlocutory decree declaring a reissued patent valid, finding certain devices to be infringements, and directing an account of profits and damages. The defendant offered the original patent in evidence, for the first time, before the master, and insisted that, upon any construction of the reissue that would be valid on comparison with the original, defendant did not infringe. *Held*, that this evidence was properly rejected by the master.

#### 2. SAME—DECREE AS TO WHAT IS AN INFRINGEMENT BINDING ON MASTER AND PARTIES.

A decree as to what is an infringement is conclusive upon the parties and upon the master, and extends to everything substantially like the infringement decreed against. *Thomson v. Wooster*, 114 U. S. 104; S. C. 5 Sup. Ct. Rep. 788.

#### 3. SAME—WEIGHT OF EVIDENCE IS A QUESTION FOR THE MASTER.

Where the evidence as to the extent of the infringement was conflicting, and sufficient to warrant the master in finding either way, according to what was believed or disbelieved, his conclusions should not be disturbed. *Bridges v. Sheldon*, 7 Fed. Rep. 17.

#### 4. SAME—LICENSE FEE.

An established royalty or license fee is evidence, and not an absolute test, of value.

#### 5. SAME—LICENSE FEE ESTABLISHED BEFORE INFRINGEMENT.

It is for the master to determine, as a question of fact, whether the value of the invention, at the time of the infringement, was equal to the license fee established after the infringement, and the court cannot say, as a matter of law, that the license fee should govern.

### In Equity.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

*Frederic H. Betts*, for orator.

*Joseph C. Fraley*, for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 5,180, dated December 10, 1870, and granted to the orator as assignee of Alexander Douglass, for an improved folding guide for turning in the edges of cloth or other material, preparatory to sewing, for binding and other purposes. The defendant offered no evidence and did not appear at the hearing; the patent had been several times adjudged to be valid; the evidence of the orator showed infringement by the defendant; and a decree was entered adjudging that the patent was valid, that the defendant had infringed, and that an account be taken by a master appointed of the profits and damages due to the infringement. The original patent was not put in evidence for the hearing in chief. The defendant offered it in evidence before the master, for the purpose of showing that there was no infringement of the reissue upon any construction of it that would be valid on comparison with the original. The master rejected this evidence, and took an account of the damages due to the extent of what was shown by the orator's evidence in chief, and adjudged by the decree, to be an infringement.

The most important question now arising is as to the propriety of this ruling by the master, raised by exceptions to his report. The later decisions upon reissued patents are relied upon largely in support of these exceptions. *Wooster v. Handy*, 21 Fed. Rep. 51; *Spill v. Celluloid Manuf'g Co.*, Id. 631; *American Diamond Drill Co. v. Sullivan Machine Co.*, Id. 74; *American Diamond Rock-boring Co. v. Gilson*, 24 Fed. Rep. 374. The question here is, however, different from the one in any of those cases, or in any similar cases which have been noticed. In those cases the interlocutory decrees were made on comparison of the reissued patents with the originals, upon the application of the principles of law bearing upon that subject, as they were understood at the time. Before final decrees were made that understanding was changed by the later decisions of the supreme court, and the final decrees were adapted to the later view. This interlocutory decree was made before that change, but the change would not affect the decree as it was made on the case presented. There was nothing in the case touching the validity of the reissue, to be considered. The reissue was granted to the orator, and would stand valid until overthrown by competent proof. The interlocutory decree was right when made, and is right now, both as to validity of the patent and as to infringement, as the case is now made to appear and is understood. The argument is that the question is one of infringement, and that such questions are always open before the master. But the decree as to the fact of infringement, and that what was adjudged to be an infringement is an infringement, is as conclusive upon the parties and upon the master as it is with reference to anything else covered by it. *Thomson v. Wooster*, 114 U. S. 104; S. C.

5 Sup. Ct. Rep. 788. This extends to everything that is substantially like the infringement decreed against for which the defendant is responsible. If there was something claimed to be an infringement which had not been passed upon by the decree, then the question concerning that would be open before the master to be passed upon by him. Here there was nothing before the master that was substantially different from the device covered by the decree. The question whether these things were infringements or not could not be passed upon by the master without reviewing the decree in that respect. This was not within his province, and his decision that he would not enter upon it appears to be correct.

The evidence as to the extent of the infringement was quite conflicting. It was sufficient to warrant a finding either way, according to what should be believed and disbelieved. The question of belief or disbelief was for the master, and no reason for disturbing his conclusions is made apparent. *Bridges v. Sheldon*, 18 Blatchf. 295; S. C. 7 Fed. Rep. 17.

There was infringement before any license fee or royalty had been established. The orator insists that the amount of the license fee should be applied as a rule of damages to that infringement, as it does not appear but that the value was the same then as afterwards. The master has found the profits of that infringement to the defendant's firm, and has not found damages otherwise. It is understood that an established royalty or license fee is evidence, and not an absolute test, of value. Whether the situation was such that the value was equal to the license fee before the latter became established, was a question of fact for the master. The weight of the evidence was for him. The court cannot say, as a matter of law, that the license fee, which did not become established until afterwards, should govern. *Suffolk Co. v. Hayden*, 3 Wall. 315; *Packet Co. v. Sickles*, 19 Wall. 611; *Birdsall v. Coolidge*, 93 U. S. 64. As the master has not found any damages for that infringement beyond the profits, it does not appear that anything more than the profits can be allowed.

These considerations dispose of all the exceptions. Exceptions overruled, report accepted, and confirmed, and decree to be entered accordingly.

ARNHEIM v. FINSTER and others.<sup>1</sup>*(Circuit Court, S. D. New York. February 1, 1886.)*

## 1. PATENTS FOR INVENTIONS—VOID REISSUE.

Where the application for the reissue was filed one year, nine months, and ten days from the date of the original, during which period articles which would infringe the claims of the reissue, but not of the original, were made and put upon the market by others, and where the inadvertence, accident, or mistake in the original, if any existed, was easily discernible, the reissue is void.

## 2. SAME—ACQUIESCENCE BY APPLICANT IN REJECTION BY PATENT-OFFICE.

Where a claim is rejected by the patent-office, and the rejection is acquiesced in by the applicant, he cannot afterwards secure such claim in a reissue, on the ground of inadvertence, accident, or mistake.

In Equity.

*Frederic H. Betts and C. Wyllys Betts*, for complainant.

*Gilbert M. Plympton*, for defendants.

COXE, J. The complainant is the owner of letters patent granted to Marcus Marks for an improvement in caps. The original patent, No. 166,395, is dated August 3, 1875. It was reissued July 24, 1877, in two divisions, A and B, Nos. 7,807 and 7,808. The application for the reissue was filed May 14, 1877, one year, nine months, and ten days from the date of the original. Division B of the reissue is alone to be considered. Division A is substantially a reproduction of the original patent.

The description is as follows. The words in brackets are not in the original patent; the words in italics are not in the reissue.

"Be it known that I, Marcus Marks, of the city, county, and state of New York, have invented a new and useful improvement in caps, which improvement is fully set forth in the following specification, reference being had to the accompanying drawing, in which Figure 1 represents a side view when the [swinging] ear and neck protector is pulled down. Fig. 2 is a vertical central section when the ear and neck protector is up. Similar letters indicate corresponding parts.

"This invention consists in an ear and neck protector, connected to the back part of the crown of a hat or cap by a tape, [or cloth,] and to the sides [or near the front of the hat or cap] by loops and buttons, or other equivalent fastenings, in such a manner that, whenever it may be desirable, said protector can be drawn down to cover the ears and neck of the person wearing the cap, and when no such protection is needed said protector can be raised, when it serves to impart to a cap a finished appearance.

"In the drawing, the letter, A, designates a cap, to the rear part of which is attached my ear and neck protector, B. The protector is held in place by a tape, [or cloth,] *a*, in its middle, [at the back,] and by loops, *b*, which are fastened to its ends, and catch over buttons, *c*, secured to the body or crown of the cap, [at the sides or near the front,] said fastenings being so constructed that the protector swings up and down as far as the tape, [or cloth,] *a*, will allow; the buttons, *c*, forming the centers on which the swinging motion takes place. It is obvious that, for loops and button, other devices may be

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

substituted without deviating from my invention. *My cap is ornamented in front by a band, C; and if the protector, B, is raised, it forms a similar band on the back part of the cap, and thereby a finished appearance is imparted to the article.*

"In cold or inclement weather, the person wearing my cap can draw down the protector, B, to the position shown in Fig. 1. In this position the lower edge of said protector hugs the neck of the person wearing my cap, with a close fit, and at the same time the ears of said person are covered, so that those parts are fully protected against cold air, wind, rain, or snow. My cap is exceedingly simple in its construction. It can be made and sold at a low cost, and it is of great convenience, particularly to persons compelled to spend much of their time in the open air."

The claim of the original and the claims of the reissue No. 7,808 (Division B) are placed below side by side.

ORIGINAL.

"As a new article of manufacture, the head-covering consisting of the crown or body, A, band, C, ear and neck protector, B, tape, *a*, and fastenings, *b, c*; said protector being arranged upon the exterior of the article, substantially as described, and adapted to move up and down thereon."

REISSUE.

"(1) As a new article of manufacture, the head-covering, A, with a swinging ear and neck protector, B, attached near the front by buttons and loops, or other equivalent devices, upon which the neck protector swings as an axis, and attached at the rear by a tape or cloth, which prevents the upper edge of the protector from swinging below the lower edge of the hat or cap; the said several parts being constructed and combined substantially as described.

"(2) The swinging or sliding neck protector, B, constructed substantially as described, so as to swing or slide on fastenings at the sides or near the front of the cap.

"(3) The swinging or sliding neck protector, B, constructed substantially as described, so as to swing or slide on fastenings at the sides or near the front of the cap, and connected with the cap at the back by a tape or cloth, to prevent it from swinging or sliding below the lower edge of the hat or cap."

The first claim of the reissue is alone in controversy. It will be observed that, in the original description, the ear and neck protector was held in place by a piece of tape attached to the middle of the protector. In the reissue, by substituting the words "at the back" for the words "in its middle," and adding the words "or cloth," the inventor covers every method of fastening the protector to the cap by means of cloth, even though it be an interlining extending the entire length of the protector. In the original, the band, C, was described and claimed as one of the component parts of the combination. All reference to it has been expunged from this reissue. It is, however, described and claimed with great particularity in division A; a fact

hardly consistent with the contention that the band, C, was no part of the invention, and was inserted in the claim through "inadvertence, accident, or mistake." There are other changes, but they are less significant. The proof also shows that between the dates of the original and the reissue, caps similar to the defendants' cap were put upon the market in large quantities. These caps infringe the claims of the reissue, but not of the original.

In June, 1885, a motion having been made for an injunction, Judge WHEELER, upon substantially the same record now before the court, following *Mahn v. Harwood*, 112 U. S. 354, S. C. 5 Sup. Ct. Rep. 174, intimated that the reissue was invalid, for the reason that the claim originally presented, for a combination without the band, C, was rejected, and, the rejection being acquiesced in, the broad claim was surrendered to the public. The mistake, if any, lay between the inventor and his solicitor in not taking an appeal, and was not the mistake contemplated by the statute. *Arnheim v. Finster*, 24 Fed. Rep. 276. That the court would then have decided the reissue invalid, had it been necessary for the purposes of the motion, is beyond cavil. Such a decision would, it is thought, have been in entire harmony with the adjudications of the supreme court since January, 1882.

That the reissue is broadened is too clear for controversy. It was broadened with full knowledge, on the part of the inventor, that, after his patent had been issued, caps in large numbers had been put upon the market having an improved swinging protector which did not infringe his patent. His solicitor, to whom he had given a full and ample power of attorney to represent him in all matters before the commissioner, knew that the broad claim had been rejected, and the claim including the band, C, allowed. No appeal was taken. No murmur of disapprobation for nearly two years was heard. Upon what theory, therefore, can this reissue be upheld? Every argument in its favor is met and answered by some controlling authority. At every turn the complainant is confronted by a decision of the supreme court. It is said that there was a mistake in not allowing the broad claim; but the proof shows that the matter was clearly understood, and the ruling of the examiner, including the band, C, acquiesced in by the solicitor. "Under such circumstances, the rejection of the claim can in no just sense be regarded as a matter of inadvertence or mistake. Even though it was such, the applicant should seem to be estopped from setting it up on an application for a reissue." *Leggett v. Avery*, 101 U. S. 256.

Again, in *Mahn v. Harwood*, *supra*, the court say:

"It was apparent, therefore, that the omission of that claim in the original was not, and could not have been, the result of inadvertence, accident, or mistake, but was the result of design on the part of the commissioner, and acquiescence on the part of the patentee; and, so far as that claim was concerned, the reissued patent was properly held to be void. The proper remedy of the patentee, when a claim applied for is rejected, is an appeal, and not an application for a reissue."

But it is urged that the inventor did not acquiesce. He knew nothing of the rejection, for the reason that he never examined the letters patent from the time he received them until the spring of 1877. This will not do. The law will not permit a party to relieve himself from the charge of negligence by asserting that he closed his eyes and ears at the time when he was required to keep his faculties awake. The inquiry is, not what the inventor knew, but what he ought to have known,—what he could have ascertained by the exercise of ordinary care and diligence. To hold otherwise would be to place a premium upon carelessness, stupidity, and fraud. There is nothing intricate or ambiguous about this patent. It does not deal with complex machinery or abstruse terms of art. The moment it was opened and read its character was disclosed. No intelligent person could have been deceived, much less the inventor himself.

To quote again from *Mahn v. Harwood*:

"The public has the undoubted right to use, and it is to be presumed does use, what is not specifically claimed in the patent. Every day that passes after the issue of the patent adds to the strength of this right, and increases the barrier against subsequent expansion of the claim by a reissue under a pretense of inadvertence and mistake. If any such inadvertence or mistake has really occurred, it is generally easily discernible by an inspection of the patent itself; and any unreasonable delay in applying to have it corrected by a surrender and a reissue is a just bar to such correction. If the specification is complicated, and the claim is ambiguous or involved, the patentee may be entitled to greater indulgence; and of this the court can rightfully judge in each case. \* \* \* There was no ambiguity, and nothing to prevent the patentee from seeing, at once, on inspecting his patent, whether his whole invention was claimed or not. We can see no possible excuse, and none has been attempted to have been shown, for allowing the patent to stand the length of time it did without any attempt to have it amended."

Again, in *Wollensak v. Reiher*, 115 U. S. 96, S. C. 5 Sup. Ct. Rep. 1137, the court say:

"If, at the date of the issue of the original patent, the patentee had been conscious of the nature and extent of his invention, an inspection of the patent, when issued, and an examination of its terms, made with that reasonable degree of care which is habitual to and expected of men in the management of their own interests in the ordinary affairs of life, would have immediately informed him that the patent had failed fully to cover the area of his invention. And this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it." See, also, the recent case of *Eachus v. Broomall*, 6 Sup. Ct. Rep. 229, (decided November 16, 1885.)

To paraphrase the language of *Coon v. Wilson*, 113 U. S. 268, S. C. 5 Sup. Ct. Rep. 537: Although this reissue was applied for a little over 21 months after the original patent was granted, the case is one where it is sought merely to enlarge the claim of the original patent by expanding that claim and adding others; where no mistake or inadvertence, such as the law recognizes, is shown, so far as the forward band and the tape are concerned; where the patentee waited until others had produced caps without the forward band, and with the con-



tinuous interlining, and then applied for such enlarged claims as to embrace the defendants' cap, which was not covered by the claim of the original patent; and where it is apparent, from a comparison of the two patents, that the reissue was made to enlarge the scope of the original.

The bill should be dismissed.

---

THE C. P. RAYMOND.<sup>1</sup>

BROWN and others *v.* THE C. P. RAYMOND, etc.

(District Court, S. D. New York. January 26, 1886.)

1. COLLISION—TOWAGE—BARK AND RAILROAD FLOAT—HIGH WIND.

The fact that a high wind prevailed at the time of a collision, which was the general cause of the accident, in thwarting the calculation of the pilots, *held* no legal justification for the accident, when it existed at the time the vessel started, and its natural effects were known and could have been foreseen.

2. SAME—TUG AND TOW—PILOT ON TOW IN CHARGE—JOINT NEGLIGENCE.

A bark towed by a hawser, and having a pilot aboard, who had general control of the navigation of both tug and tow, *held* liable, in part, for a collision that occurred through the negligence of both pilots.

3. SAME—STATEMENT OF CASE.

The tug R. started from Brooklyn to tow the bark M. to sea on a hawser, in a high wind. The bark had a pilot on board, who had the general control of the navigation of both. The tug, in her course, brought the bark to within 700 feet of the New York shore, near Pier 7, where lay a heavy railroad float lashed to the tug G., which had stopped nearly still in the water, to allow another tow to cross her bow and make Pier 7. The bark M. ran into the railroad float, which was on the former's starboard hand. On suit brought by the owners of the bark against the tug G. and the tug R., *held*, that the tug G. was not in fault, as she did all that was possible to her to avoid the collision from the time when she had any reason to suppose the bark would not keep out of the way; that the tug R. was in fault for going needlessly so near the New York shore, and for not avoiding the float, which was on her starboard hand, and for not using her full steam-power in a high wind; that the bark was liable for the negligence of the pilot in charge of her in not directing the other pilot to keep more away, and for not using the bark's own helm-betimes for the same purpose, and that the damages and costs should be divided between the bark and the tug R.

In Admiralty.

*Jas. K. Hill, Wing & Shoudy*, for libelants.

*Owen & Gray*, for the George P. Garlick.

*Wilcox, Adams & Macklin*, for the C. P. Raymond.

BROWN, J. The libel in this cause was filed by the owner of the bark Margaret Mitchell, to recover \$20,000 damages alleged to have been sustained by the bark and her cargo, between 9 and 10 o'clock A. M., on the tenth day of January, 1885, through a collision on the

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

East river with a float in tow of the steam-tug George L. Garlick. The bark, of 650 tons, was proceeding out to sea in tow of the tug C. P. Raymond, on a hawser of from 25 to 30 fathoms. The tide was ebb, and the wind very high from the north-west. The bark had been lying at Pierpont's stores, Brooklyn. She was hauled out stern first; her head swung up river, and was pulled around through the northward until she headed down and out of the East river, through the main ship channel. During this time, two tows were coming down the East river; one, the steam-tug Lockhart, with four barges in tow upon a hawser about 50 feet long, in three tiers, making the tow, including the tug, about 575 feet long, and bound for Pier 7, East river. A little astern of this tow, and a little nearer to the New York shore, was the steam-tug Garlick, with a railroad car float lashed upon her port side 210 feet long, projecting much ahead of the tug, bound from Williamsburg to Jersey City. The float had two railroad tracks on it with six cars, each 29 feet long, on the port track, and five cars on the starboard track. The Lockhart, when nearly abreast of Pier 8, gave a signal of two whistles to the Garlick, indicating that she desired to cross the latter's bow, to which the Garlick immediately replied with two; and thereupon the Lockhart ported her helm, and ran in to the New York shore, rounding so as to head up river along-side of Pier 7. The tide carried her tow gradually downwards, but the high wind kept it off and out in the river longer than usual. The Garlick, to keep clear of the Lockhart and her tow, which were passing across her bows, first slowed, and then stopped, and backed her engine full speed. In the mean time the Raymond and the bark were gradually coming nearer to the western shore of the river. As they moved down and across, and while the Garlick was backing, the starboard bow of the bark came in contact with the float, striking the forward part of the third car, at the point where the bark's anchor hung overboard, with its flukes beneath the water. The blow was sufficient to cause the anchor to crush through the bark's bow, through which she took in water, damaging the cargo. Some of the stays about the bowsprit were also carried away.

The general cause of this collision was undoubtedly the very high wind that prevailed. This affected considerably the movements of all the vessels, and, to some extent, evidently, thwarted the calculations of the pilots of the Raymond and the bark. But as this wind existed at the time they started, and its natural effects were known, and could have been foreseen, this cannot suffice as a legal justification, or absolve the parties from legal fault.

It is of importance to determine approximately the place of the collision in the river. The witnesses vary all the way from Pier 8 to Pier 3, and from mid-river to within 600 feet of the New York shore. The collision was viewed by witnesses apparently disinterested, some of whom were astern and some ahead of the Garlick, on the river; and by one from the Gracie, at the end of Pier 10. The pilot of the

Lockhart, though he did not observe the collision itself, when he got up along-side of Pier 7, saw the boats in contact, as he says, nearly abeam. The pilot of the *Gracie*, at the head of Pier 10, saw the collision in range of the clock on the eastern side of Governor's island, and to him the collision appeared to be off Pier 3. The range fixed by this witness is important. Though that was a little before the collision, the *Garlick* could not afterwards have gone much, if any, out in the river, though her wheel was starboarded, because she was backing. This witness could not judge of the distance down river. That is fixed much better by the pilot of the *Lockhart*, and by the pilots on the ferry-boats crossing below, and by other witnesses whose testimony together satisfies me that the collision was not below Pier 6. This, together with the range given by the pilot of the *Gracie*, proves conclusively that the collision was less than 700 feet from the New York shore,—not a quarter of the distance across the river at that point. This is confirmed, also, by the natural probabilities of the case. The *Lockhart* passed under the Brooklyn bridge at about its center, *i. e.*, 800 feet from the shore. She was bound for Pier 7, and would naturally keep along at about the same distance from the New York shore until she rounded to. The *Garlick* was estimated about 200 feet nearer the shore than the *Lockhart*. They were somewhat in the lee of the very high wind from the north-west, and there was strong reason for their not going unnecessarily further out in the stream.

The place of the collision being thus approximately fixed, the bark and the *Raymond* must be found in fault (1) for going without reason so near to the New York shore, and in a space set apart by law for the accommodation of tugs and tows, when that space was already incumbered by the presence of tows, and when all the rest of the river was clear; (2) having these tugs and tows upon the starboard hand, the *Raymond* and the bark were bound to keep out of their way, and to take timely means for doing so.

On the part of the *Raymond* and the bark there was some evidence to the effect that they were ahead of the *Garlick*, and that the *Garlick* in reality ran into the bark. The witnesses for the *Garlick* contradict this; and one circumstance, which there is no reason to discredit, clearly proves them correct. When the bow of the bark collided with the car upon the float, the whole line of six cars, through the force of the blow, was carried forward several feet upon that track, the lashings upon the cleats slipping. The cars upon the other track did not move. This proves that the bark had a considerable forward motion as compared with the *Garlick*, and that it was therefore the bark that ran into the *Garlick*.

2. I find no fault attributable to the *Garlick*. She first stopped and backed to allow the *Lockhart* to round to with her tow ahead of her. At that time the bark was some little distance off her port quarter coming down and across the river. The *Garlick* had no reason to suppose that the bark would not keep out of the way, as it

was her legal duty to do. The Garlick, when she had backed sufficiently to avoid the Lockhart's tow, stopped backing. Afterwards, as soon as it became apparent that there was doubt whether the bark was going to keep out of the way, she backed again, and got some 80 or 90 revolutions astern before the collision. In doing so her bows swung naturally a little to port; but, clearly, her maneuver, as a whole, did nothing to thwart the tug and the bark in keeping out of her way. The bark, as above stated, kept on and ran into the Garlick when the latter must have been nearly still in the water. The latter did all she could reasonably do, so far as I can perceive, to avoid the collision from the time when any danger of it became manifest. She must therefore be held discharged.

3. The evidence shows that the pilot taken on board the bark had the general control of the navigation of both, although the immediate movements of the tug were directed by her own pilot. The latter was, however, bound to observe any directions that the pilot on board the bark might choose to give. None were given by him in this case. The bark must therefore be held liable, because she did not keep out of the way of the Garlick; and because she is answerable for the neglect of the pilot on board of her, who had the general control of the navigation, and who ought to have exercised his authority to keep out of the way. *Sturgis v. Boyer*, 24 How. 110. The evidence shows, also, that the bark made no such diligent use of her own helm to aid the tug as she might and ought to have done in order to avoid the Garlick; but put it to starboard at the last moment only,—too late to be of any use. The Raymond must also be held in fault, because her pilot, acting under his own judgment, and practically and in fact directing the navigation of both vessels, did not sufficiently keep away from the Garlick, and from the Lockhart's tow, as he was also bound to do, and as it was easily in his power to do, all the rest of the channel being free. In addition to this, it also appears that the Raymond, though the wind was high, and all her power was needed in the service of the bark, used much less than her full steam-power, and thereby had the tow under less control than she might have had.

The libel should be dismissed, as respects the Garlick, with costs; and as between the tug and the bark the damages and costs must be divided.

THE VENTURE.<sup>1</sup>

## Hook and others v. THE VENTURE.

*(District Court, W. D. Pennsylvania. December 12, 1885.)*

## 1. MARITIME LIEN—STATUTORY LIEN.

The liens against a domestic vessel created by the Pennsylvania statute of April 20, 1858, have priority over a mortgage for purchase money recorded under the act of congress.

## 2. SAME—SUPPLIES OF COAL.

Such vessel is subject to a lien for supplies of coal furnished her, although the statute does not expressly mention coal or fuel.

## 3. SAME—CONSTRUCTION OF PENNSYLVANIA STATUTE.

This latter construction of the statute has become fixed by long usage and judicial recognition.

## 4. SAME—SERVICES IN HOME PORT.

No lien in admiralty or under said statute exists for services performed at her home port in raising a sunken vessel.

## In Admiralty.

*Sur* exceptions to commissioner's report distributing the proceeds of sale.

On August 19, 1885, a libel was filed against the steamer *Venture's* owners. A decree was obtained against the boat, and it was condemned, and sold by the United States marshal, and the proceeds of sale paid into court. S. C. McCandless, Esq., was appointed commissioner to distribute the fund among the various creditors, and a portion of his report follows:

"A large number of creditors have been permitted to intervene for their respective interests, the character of whose claims may be classified as liens in admiralty for mariners' wages, liens created by the statute of Pennsylvania relating to the attachment of steam-vessels, and a claim for the balance unpaid of a mortgage on five-sixteenths of the vessel, for the payment of which a claim is set up for one-fourth of this fund remaining after the payment of costs and admiralty liens, and against all claims under the statute above mentioned. This is the mortgage for which suit was brought by John G. Brittain for the purpose of foreclosure at No. 7, October term, 1884, in admiralty of this court, wherein your honor held that the court did not have jurisdiction to enforce it.

"The claims for mariners' wages are, with some slight changes, allowed as presented, after the payment of which, and the costs in the case, claims ascertained to be liens of the second class under the state statute will take the remainder of the fund, unless superseded in part by the mortgage above mentioned. Such being the case, the effect of the mortgage as against this fund may as well be here determined. Objection is made both to the form of the application, and to the claim on its merits. Presuming that, if only objectionable in form, your honor would permit an amendment, I will discuss the claim on its merits.

"Notwithstanding the many able opinions cited by the learned proctor representing this interest, so far as I am able to ascertain, the decision of the United States circuit court in *Srodes v. The Collier*, 2 Pittsb. Rep. 318, has not

<sup>1</sup>From the Pittsburgh Legal Journal.

been overruled by the United States supreme court, and, since rendered, has been the law in this district. The learned proctor's argument seems to me to be answered in every particular, and his position to be fully controverted, by the opinion in that case. I might quote from it extensively, but prefer rather to refer to only that part of it relating to this subject. Opinions of circuit and district judges on both sides of this question have been quoted, but unless found to be decided otherwise by the United States supreme court, or by the judges of the Third circuit, or in this district, I must adhere to it in this matter. The case of *The Lottawanna*, 21 Wall. 558, does not overrule the decision in *Srodes v. The Collier*, the surplus having there been awarded to the mortgagee, in preference to the claimant to a lien under the statute of Louisiana, simply because the latter, claiming a 'privilege,' had not complied with the terms of said statute, and consequently had no lien, and the mortgagee, having properly petitioned for the surplus, had it given to him, just as his proportionate share of this fund could be given to the petitioner in this case if there should be a surplus remaining after the payment of the lien claims. Considering, as I do, that the decision in *Srodes v. The Collier* has not been overruled, the mortgagee's claim must be postponed to the liens established by the Pennsylvania act of assembly.

"All claims for coal furnished the vessel for fuel are opposed on the ground that fuel is not provided for by the statute. The word 'coal' or 'fuel' is not there mentioned, but it has uniformly been allowed in this district as one of the articles provided for by the section creating liens of the second class. I read that section, omitting whatever cannot relate to this article, in this way: 'For all debts contracted by the owner or owners, agent, consignee, master, clerk, or clerks of such ship, steam or other boats \* \* \* for or on account of work and labor done or materials furnished by \* \* \* boat, store, or provision furnishers \* \* \* in the \* \* \* fitting, furnishing, or equipping such ships, steam or other boats,' etc. By reference to the section as printed in Purdon's Digest, (page 97,) it will be observed that, in the part above mentioned, the comma is placed after the word 'boat;' so that we may read it, 'boat furnishers, store and provision furnishers,' and construe it to mean materials furnished by boat furnishers or persons who furnish boats, etc. Hence the party who supplies fuel burned under the boilers, in the cabin or the kitchen, would have a like claim to the party who furnishes provisions for the table. The case of *Merchant v. The Odorilla*, 5 Wkly. Notes Cas. 288, is cited as an authority to sustain this objection. It was there held by the supreme court of Pennsylvania 'that the lien given to vendors of copper sheathing could not be inferentially extended to the case of rings and bolts merely because they formed part of the ordinary business of the libellant.' But a distinction is there made between a lien given to a party following a particular trade or calling and the vendor of a particular thing. To quote from the opinion: 'For example, a lien given to blacksmiths would cover all articles furnished ordinarily belonging to this trade and made by blacksmiths,' but when given to the vendor of a particular thing, although he may sell other articles, the law cannot be made to reach these different subjects of sale. If I am right in my reading of the section, (Purd. 97,) the boat furnisher has a lien by reason of his calling, and is not limited like the 'vendor of copper sheathing' mentioned in the opinion. Therefore the bills for fuel furnished the vessel are allowed.

"The claims of William Merrington for raising the steam-boat when sunk, and of Joel Kerr for the hire of crane-boats used in the same work, are opposed as not being provided for in the statute. The opinion of your honor in the case of *The D. S. Newcomb*, reported in 12 Fed. Rep. 735, completely rules out both of these claims, for no lien in admiralty exists because the service was performed at the home port, and the libels cannot be sustained under the local statute. They are therefore excluded therefrom.

"The same objection applies to the claim of George W. Henning *et al.* for testing the boilers of this steam-boat. and to so much of J. S. Adams' bill as is for moving and pumping this boat's fuel flat, and they are also disallowed.

"Felker & Wilson have intervened for the amount of a note given for materials and labor. This is a lien of the third class, unless the date of the original bill, which is beyond the time limited by the statute, would exclude the note also. But as the fund will not extend far enough to reach it, it need not be considered.

"The claim of the city of Pittsburgh, for wharfage, is a fourth-class lien under the statute, but cannot be paid on account of the insufficiency of the fund.

"George Thompson, mate, holds a due-bill, and D. W. C. Carroll, Limited, Louis Kreiling & Son, and Reed & Kreps, hold notes for the amounts due them, respectively. It is hereby suggested that the payment of the amounts awarded these creditors be made conditional upon the surrender of said notes, or their production for the indorsement of the same as a credit.

"The claim of the steamer Ross Miller is objected to for the reason that the items were furnished by a steam-boat, and not by an individual, and therefore do not constitute a lien as provided for by the act of assembly. If the articles furnished were such materials as, if purchased at a boat-store, would create a lien, I do not think that the fact of their having been the property of another boat ought to make any difference."

Exceptions to the commissioner's report were filed and argued by George C. Wilson, Albert York Smith, and W. L. Bird.

Edwin W. Smith, for the report.

Geo. C. Wilson, for original libelants.

Barton & Son, for Venture owners.

Bird & Porter, for mortgage creditor.

W. C. Moreland, for City of Pittsburgh.

Thomas C. Lazear, E. P. & C. W. Jones, J. S. Ferguson, Wesley I. Craig, Knox & Reed, Albert York Smith, L. B. Duff, A. B. Hay, George Elphinstone, George C. Wilson, Barton & Son, Isaac S. Van Voorhis, Morton Hunter, Geo. R. Lawrence, K. T. Friend, A. H. Clark, and Geo. W. Acklin, for intervening creditors.

ACHESON, J. I have carefully examined the report of the commissioner, and am entirely satisfied with his conclusions.

1. The commissioner was clearly right in giving to the liens under the Pennsylvania statute a preference over the mortgage of John G. Brittain. The case of *Srodes v. The Collier*, 2 Pittsb. Rep. 304, is decisive of the question. It is altogether a misapprehension to suppose that the authority of that case has been at all shaken by the decision in *The Lottawanna*, 21 Wall. 558. See the case of *The Wm. T. Graves*, 8 Ben. 568.

2. While it is true that "coal" or "fuel" is not expressly mentioned in the statute, yet the general language of the law may well be taken to embrace a claim for coal supplied to and used on a steam-boat. This has been the universal understanding, and claims of this character have been constantly allowed by the court. It is now too late to question a construction of the statute which has been sanctioned by long usage and judicial recognition.

3. The claims of William Merrington, Joel Kerr, and George W. Henning and others are for services not covered by the statute, and were properly disallowed. *The D. S. Newcomb*, 12 Fed. Rep. 735.

And now, December 12, 1885, the exceptions to the report of the commissioner are overruled, and said report is confirmed absolutely; and it is ordered, adjudged, and decreed that the fund be paid out in accordance with the commissioner's schedule of distribution, unless an appeal from this decree be taken within 10 days.



STATE OF KANSAS *ex rel.*, etc., v. BRADLEY.

(Circuit Court D. Kansas. December 31, 1885.)

## 1. FEDERAL QUESTION—WHEN QUESTION NO LONGER SO.

A point having once been decided by the supreme court of the United States, cannot be held to present a federal question.

## 2. SAME—RESTRICTIONS UPON POWERS OF STATE—FOURTH, FIFTH, SIXTH, AND SEVENTH AMENDMENTS.

The fourth, fifth, sixth, and seventh amendments to the federal constitution contain no limitations or restrictions on the powers of the state.

## 3. SAME—REMANDING CAUSE—DOUBTFUL JURISDICTION—RULE—STATE POLICE LAWS.

The rule that the federal courts should remand in cases of doubtful jurisdiction is especially true of cases in which the state is attempting, in its own courts, to enforce its statutes, designed for the peace and good order of its citizens.

## 4. SAME—MANUFACTURE AND SALE OF INTOXICATING LIQUORS.

A state may absolutely prohibit the manufacture or sale of intoxicating liquors. No state supreme court has denied the power, and the supreme court of the United States, both before and after the adoption of the fourteenth amendment to the constitution, have often and expressly confirmed it.

## On Motion to Remand.

BREWER, J. This is a proceeding commenced in the district court of Atchison county, under section 13, c. 128, Laws 1881, as amended by c. 149, Laws 1885. The petition charged the defendant with keeping a saloon in violation of law, prayed an order declaring it a nuisance and abating it, and enjoining defendant from maintaining it. The defendant filed in the district court a petition and bond for removal. That court denied his application. 2 Kan. Law J. 246. Nevertheless, defendant took a transcript of the record of that court and filed it in this. The plaintiff now moves to remand.

The question presented is whether the case is a removable one. No difference of citizenship exists, and the case is removable only on condition that in it exists what is commonly called a federal question. The latest definition given by the supreme court is in the case of *Starin v. New York*, decided November 2, 1885, and reported in 20 Reporter, (No. 23,) p. 707, S. C. 6 Sup. Ct. Rep. 28, and is as follows:

"If from the questions it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875, otherwise not. Such is the effect of the decisions on this subject. *Cohens v. Virginia*, 6 Wheat. 279; *Osborn v. Bank of U. S.*, 9 Wheat. 824; *Mayor v. Cooper*, 6 Wall. 252; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 201; *Tennessee v. Davis*, 100 U. S. 264; *Railroad Co. v. Mississippi*, 102 U. S. 140; *Ames v. Kansas*, 111 U. S. 462; S. C. 4 Sup. Ct. Rep. 437; *Kansas Pac. R. Co. v. Atchison R. Co.*, 112 U. S. 416; S. C. 5 Sup. Ct. Rep. 208; *Provident Sav. Soc. v. Ford*, 114 U. S. 641; S. C. 5 Sup. Ct. Rep. 1104; *Pacific R. R. Removal Cases*, 115 U. S. 11; S. C. 5 Sup. Ct. Rep. 1113."

When a proposition has once been decided by the supreme court, it can no longer be said that in it there still remains a federal question. More correctly it is said that there is no question, state or federal. This is the only fair starting point for consideration of a case like this. A state may absolutely prohibit the manufacture or sale of intoxicating liquors. No state supreme court has ever denied the power, and the supreme court of the United States, both before and after the adoption of the fourteenth amendment, has often and expressly affirmed it. *License Cases*, 5 How. 504; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*, 112 U. S. 205; S. C. 5 Sup. Ct. Rep. 97. This power, comprehensive and absolute, carries with it everything which is merely incidental. The means for executing the power go with it, and rest in the unquestioned discretion of the legislature. It were folly to say that the power exists, and in respect to it no federal question is involved, and at the same time to hold that the use of any of the ordinary means for executing such a power presents a question for the cognizance of federal courts. So, before any of the means and processes prescribed for the execution of this power can be held to present any question of federal cognizance, it must appear that such means or process discloses in and by itself a direct invasion of some right protected by the federal constitution.

Something was said in the argument about a conflict between this prohibitory law and the fourth, fifth, sixth, and seventh amendments to the federal constitution. It seems scarcely necessary at this late day to say that those amendments contain no limitations or restrictions on the powers of the state. *Barron v. Mayor, etc.*, 7 Pet. 243; *Livingston's Lessee v. Moore*, 7 Pet. 469; *Fox v. State*, 5 How. 410; *Smith v. State*, 18 How. 71.

The real reliance of defendant is on the fourteenth amendment, which reads:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This contains three prohibitions on state action. The first has no application. So says the supreme court in *Bartemeyer v. State*, 18 Wall. 129, as follows:

"The most liberal advocates of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on state laws for their recognition, are now placed under the protection of the federal government, and are secured by the federal constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent state legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly

on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer v. People*, 13 N. Y. 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a state, or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter House Cases*."

The *Slaughter House Cases*, 16 Wall. 36, dispose of the third prohibition. See, also, *Foster v. State*, 112 U. S. 205, S. C. 5 Sup. Ct. Rep. 97, where the constitutionality of this prohibitory law, at least prior to the amendment of 1885, was affirmed; also the case of *Missouri Pac. R. Co. v. Humes*, 6 Sup. Ct. Rep. 110, recently decided by the supreme court, in which the double damage law of Missouri, although in some respects unequal between all the citizens of the state, was sustained as a proper exercise of the police power.

This leaves only the second prohibition: "Nor shall any state deprive any person of life, liberty, or property without due process of law." Does this statute contemplate any action without due process of law? The phrase "due process of law" is probably identical, or nearly identical, with the phrase "law of the land." In the *Dartmouth College Case*, 4 Wheat. 581, Webster defines the latter phrase thus: "By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial." Now, under this statute no property held by defendant, even though held for purposes forbidden and in defiance of law, is touched; no business, although in contempt of the state's mandate, is interfered with, except after notice, judicial injury, and condemnation. Is not this due process of law? But it is said that the statute contemplates the seizure and destruction of property through the forms of the law, and that this no state has power to do; that an attempt so to do presents a question of federal cognizance, and for examination in the federal courts; that those courts are charged with the duty of inquiring whether such destruction is warranted. I do not propose, in this case, to enter upon any discussion of this question. I have it presented in another case, that of *State v. Walruff*, ante, 178, under such circumstances as will compel a full examination. I simply hold that the proposition, if correct, is not applicable to this case.

*First.* It may be doubted whether, under this proceeding, seizure and destruction are permissible; whether the only remedies obtainable are not injunction and punishment. *Second.* If permissible, they are the mere incident of the action, and not the subject-matter in dispute, which is whether defendant is engaged in a prohibited business, and if so should be enjoined. *Third.* No business or property is di-

rectly or indirectly involved in or affected by this action, which defendant ever had the unrestricted right to continue or sell.

Additional and stringent restrictions have been imposed by this statute, but the power to impose them is beyond question. No property or personal rights of defendant are invaded, save as he acts in defiance of those restrictions. No property or business is touched, save by judicial proceedings of old and familiar use. How, then, can it be said that his property is taken, or his business destroyed, without due process of law?

Finally, it must be remembered that in questions of doubt as to jurisdiction, the federal courts should remand. They should not be covetous, but miserly, of jurisdiction. The state court had originally unquestioned jurisdiction. The overburdened docket of this court should not be loaded with removed cases, unless its jurisdiction is clear and the mandates of the law imperatively require it. Especially is that true of cases in which the state is attempting, in its own courts, to enforce its statutes, designed for the peace and good order of its citizens.

The motion to remand will be sustained.

---

HAMMERSCHLAG MANUF'G Co. v. JUDD.

(Circuit Court, D. Massachusetts. January 29, 1886.)

WITNESS—TAKING TESTIMONY OF UNWILLING WITNESS ON MOTION FOR PRELIMINARY INJUNCTION.

In Equity. Motions of defendant for order for subpoena and attachment.

*Livermore & Fish*, for complainant.

*Browne & Browne*, for defendant.

COLT, J. When either party, on motion for a preliminary injunction, desires to take the testimony of an unwilling witness, application should be made to the court, and notice given to the other side. The motion should be in writing, and should set forth the name or names of the witnesses, and briefly the purpose for which they are to be called. The court should then, if the application is a proper one, appoint an examiner to take such testimony, due notice to be given to the other side, who should have the right of cross-examination. The defendant's motion for subpoena, in its present form, and also his motion for attachment, must be denied.

## ROYAL BAKING POWDER CO. v. DAVIS and others.

(Circuit Court, E. D. Michigan. November 5, 1885.)

1. **TRADE-MARK**—"ROYAL BAKING POWDER"—"CORAL BAKING POWDER."

The words "Coral Baking Powder," in connection with the color of the label on which they appear, and the general appearance of the cans bearing the label, are calculated to deceive the public, although in themselves they are no infringement on the trade-mark "Royal Baking Powder."

2. **SAME—INJUNCTION, THOUGH NO INFRINGEMENT.**

Injunction granted to restrain the use of the words "Coral Baking Powder," the same being calculated, in connection with a similarity in the labels and cans, to mislead the public into mistaking the one for the other.

In Equity.

*Isaac Marston*, for plaintiff.

*John D. Conely*, for defendant.

BROWN, J. This is a bill in equity for the infringement of plaintiff's trade-mark, which consists of the words "Royal Baking Powder," used in connection with labels of a particular design and color, applied to the cans containing the article manufactured by plaintiff.

The defendants make use of cans of precisely the same size and shape, to which are affixed labels of the same colors and general design as those of the plaintiff, with the words "Coral Baking Powder" thereon. The answer avers "that the shape and size of the can described in the bill is a common mercantile article in the market, and is made by different manufacturers for holding baking powders;" that "the colors on the labels are also in common use by baking powder manufacturers;" and denies that the colors and devices mentioned in the bill, in combination with each other, or with any other matter or thing, constitute a trade-mark. The labels used by defendants' firm are similar to those used by the plaintiff in their color, and to the extent that one-half of the label has a red ground with white letters and the other half a yellow ground with black letters. The corner ornamentations upon the red half are the same, but the words upon this ornamentation differ. The word "Royal" on plaintiff's red ground is in good-sized letters. The word "Coral" on defendants' is in larger letters. In the center of plaintiff's red ground the ornamentation is a picture of a Royal baking powder can in a circle. In the center of defendants' red ground is a circle containing therein the words "Trade-mark," with a large picture below of a piece of coral.

I do not think the use of the words "Coral Baking Powder" is in itself an infringement of plaintiff's trade-mark,—*"The Royal Baking Powder."* The difficulty is with the similarity of the labels upon which the words are used. The general arrangement of the words being the same, the devices upon the cans being very much alike, and the labels of the same color and general appearance, I think purchasers might be very easily deceived into buying the one

for the other. The injunction, then, will not extend to the use of the words "Coral Baking Powder," but to their use in connection with cans and labels of the same general appearance as those of the plaintiff.

### CITIZENS' NAT. BANK *v.* WERT and others.

(Circuit Court, D. Indiana. November 23, 1885.)

#### 1. MORTGAGE—SUBSTITUTION OF MORTGAGEE.

When a secured obligation has become due, the debtor may, by an agreement, without the consent of the creditor, substitute, in place of the latter, another person, who pays such creditor the amount due upon the obligation.

#### 2. SAME—RIGHTS AND POWERS OF FIRST MORTGAGEE.

A mortgagee cannot, by executing and recording a release, without consent, cut off the rights of a person who pays the obligation at its maturity, under an agreement with the mortgagor that he shall be substituted in the place of such mortgagee.

#### 3. SAME—RIGHT OF THE SECOND MORTGAGEE TO OBJECT.

The holder of a second mortgage cannot object to the substitution, in place of the prior mortgagee, of a party who, by agreement with the debtor, pays to such prior mortgagee the full amount due him upon the maturity of the obligation.

In Equity. Exceptions to master's report.

*Harris & Calkins*, for complainant.

*S. M. Shepard*, for defendants Wert.

*McDonald, Butler & Mason*, for defendants Robertson & Perry.

Woods, J. Bill and cross-bills to foreclose three mortgages by their respective owners. The first and more important question to be considered is one of subrogation, or rather of conventional substitution, and arises upon the following facts: The defendant Lillian E. Wert, in June, 1877, accepted a conveyance of real estate, subject to a mortgage to the Middlesex Banking Company, of Connecticut, for \$500, which she assumed to pay, and at the same time executed to her vendor, Russell, a second mortgage for \$400, balance of purchase money; and this mortgage, which was not recorded, is owned by the Citizens' National Bank. In April, 1879, Mrs. Wert made a third mortgage upon the same property to Robertson & Perry, partners, to secure the payment of two notes of her brother to R. & P., one for \$340 and the other for \$345, due, respectively, in two and three years from date. In April, 1882, the first-named mortgage had become due; and, being without means to pay it, Mrs. Wert applied to Edwin A. Wert, brother of her husband, and agreed with him that he should loan to her the money necessary to make the payment, and should hold and keep alive the mortgage as security for the repayment of the loan. Accordingly, Edwin A. Wert furnished and paid the money to the agent of the mortgagee, who

refused to assign the mortgage to said Edwin as requested, but executed upon the mortgage bond a receipt, of the tenor following:

"Received, May 15, 1882, of Lillian E. Wert, per Edwin A. Wert, \$569.16 the full amount, principal and interest, taxes, insurance on this mortgage, all of which is paid for and at the request of Lillian E. Wert.

[Signed]

"M. E. VINTON & Co.,

"Agents for Middlesex Banking Co."

The banking company, by its agents, at the same time executed a formal release of the mortgage, to be put on record; but, instead of delivering it directly to Mrs. Wert, or to Edwin A. Wert, as they each desired and demanded, caused the same to be recorded. Upon learning this, Mrs. Wert and her husband, who had joined in the execution of the several mortgages made by her, executed and caused to be recorded a declaration and agreement, setting forth the facts in detail, to the effect that Edwin A. Wert was intended to be and should be subrogated to the rights of the banking company in the mortgage; and, in his cross-bill, said Edwin insists upon this right, and the master has allowed it.

On behalf of the holders of the junior liens, it is objected that this mortgage has been paid and canceled of record, and therefore cannot be revived to their injury. But the question is, not whether or not a paid and extinguished security shall be put upon foot again, but whether or not, under the circumstances, it ever lost vitality. To hold that it has not, puts none of the objectors in a worse plight, and gives just force to the agreement between Mrs. Wert and Edwin Wert, who, instead of being an intruder or volunteer, supplied, at her request, the money which was paid to the mortgagee. No good reason has been suggested why, when a secured obligation has become due, the debtor may not, in this way, either with or without the consent of the creditor, obtain the substitution of a new and presumably more lenient creditor. In *Dering v. Earl of Winchelsea*, 1 Lead. Cases Eq. 154, it is said: "A stranger paying the debt of another will not be subrogated to the creditor's rights, in the absence of an agreement to that effect."

This implies that the substitution may be effected by an agreement to that effect; and that the creditor's consent is not essential seems clear on principle, if not, indeed, upon authority. By giving to her brother-in-law another mortgage upon the property, Mrs. Wert might have clothed him with the unquestionable power to pay off any prior incumbrance, and keep it alive for his own benefit; and if, in this and other indirect ways, she could confer upon him or any stranger such right, as clearly she could, it would be unreasonable to say that the same end may not be accomplished by direct agreement with the one to be substituted, and without the consent of the creditor to be displaced. Indeed, a more striking illustration of the right to effect such a substitution in an indirect way is found in the facts of this case. Russell was the original debtor; but after and by virtue of

the agreement of Mrs. Wert made with him, without the consent of the banking company, to assume the debt, he became, as to Mrs. Wert, surety only, and as such had the clear right to pay the debt and be subrogated to the rights of the creditor in the mortgage. In such a case, the original creditor whose demand is due has no right to object, and neither should have in the case at bar, or in like cases, because the effect upon him and his interests is not different.

The seller of a note, it is true, incurs some liability, though the transfer be by delivery only; if nothing more, he warrants the genuineness of the note. But, plainly, this proposition has no application here, more than in unquestioned cases of purely equitable subrogation; because the transfer is not effected by a sale, nor other act of the creditor or holder of the note. Done without or against his consent, the transfer can in nowise create or imply liability on his part of any character whatever. In support of the view taken by the court, the following authorities were cited by counsel in argument. Dix. Subr. 166; Sheld. Subr. 286; *Brice's Appeal*, 95 Pa. St. 145; *Wilson v. Brown*, 13 N. J. Eq. 277; *Shreve v. Hankinson*, 34 N. J. Eq. 76; *Edwards v. Davenport*, 20 Fed. Rep. 756; *Levy v. Martin*, 48 Wis. 195; S. C. 4 N. W. Rep. 35.

Exceptions overruled.

---

### UNITED STATES v. CURTNER.

(Circuit Court, D. California. January 18, 1886.)

#### 1. PUBLIC LAND—UNITED STATES VACATING PATENT.

Where a patent has been issued by mistake to a party not entitled to it, and the United States is under an obligation to make a good title to another party, they may maintain a suit to vacate the prior patent.

#### 2. SAME—PARTIES.

In such a case, when the lands have been listed to a state, and by the state patented to private parties, neither the state nor the party entitled to the lands is a necessary party to the suit.

#### 3. SAME—MULTIFARIOUSNESS.

A bill, against several parties having no joint interest in the lands, to vacate several patents of distinct parcels of lands, is not multifarious.

*S. G. Hilborn*, U. S. Atty., and *Shafter, Parker & Waterman*, for complainant.

*L. D. Latimer*, for defendants.

*SAWYER, J., (orally.)* This is a bill filed by the United States to set aside listings of certain lands to the state of California, and certain patents therefor, issued to defendants by the state. The ground is that the lands listed and patented are odd sections within the limits of the grant made by the United States to the Central Pacific Railroad Company; that no other right had attached to them at the time of filing the definite location of the road; that the road having been



completed pursuant to the act of congress, the title vested; and that the lands were listed over to the state by mistake, the right of the railroad company to a patent having before the listing fully vested and become perfect. The state, after such listing over, patented them to the several defendants or their grantors in this case. This suit is brought by the United States, under direction of the attorney general, to annul the listing and these patents, on the ground that they were issued by mistake, when there was no right, except the bare, naked, legal title, left in the United States, and no authority in the officers of the United States to list them over to the state of California. There is a demurrer to the bill.

In the first point counsel follow the suggestions in the case of *U. S. v. Minor*, 114 U. S. 233, S. C. 5 Sup. Ct. Rep. 836, as to whether, the right to the lands having already passed out of the United States, the complainants have any interest in the suit. They suggest the points therein indicated, and rely upon them. I think the United States have such an interest in the lands, or that they stand in such relation to them, as entitles them to maintain a suit. Under the allegations of the bill, the right to a patent to the lands was fully vested and perfected in the railroad company before the listing to the state. The officers of the government, therefore, acted wholly without authority in listing them to the state; but they did list them over, and the state has patented them to the several defendants and their grantors, and thereby a conflict has arisen, and the government recognizes the right of the railroad company. There has been a conflict for years over these lands, the railroad company seeking a patent. The government, after a due consideration of the subject, recognizes the fact that these lands belong to the railroad company, but declines to complicate the matter by issuing another patent. It prefers to vacate the title issued, in order that it may give a perfect title, which I think is a very proper mode of procedure on the part of the United States. It is much better than issuing another and second patent, thereby complicating the title, and leaving the railroad company a long litigation with each individual defendant on its hands. It was through the wrongful acts of the officers of the government that this conflict arose, and the listing to the state stands in the way of issuing the patent to the proper party. As the wrong resulted from the mistake of the government officials, the government of the United States is under obligation to perfect the title for its first grantee. The United States have an interest, therefore, in the litigation, because they are morally and legally bound, although there may be no remedy in the courts against the government, to see that this title is made perfect, and they therefore stand in such relation to the lands in this case as gives them a right to intervene to set aside the listing to the state, and the patents issued in pursuance of such listing, in order that they may perform their duty, and discharge their legal and moral obligation to the railroad company. The following authorities, I think, sustain that

position: *U. S. v. Hughes*, 11 How. 568; *Hughes v. U. S.*, 4 Wall. 235; *U. S. v. Stone*, 2 Wall. 535; *U. S. v. Robbins*, 96 U. S. 533. The United States is an injured party, it being placed in that position where it cannot fulfill its legal obligation. I think that objection, therefore, should be overruled.

The second objection is that there is a defect of parties plaintiff, the railroad company not having been made a party. The railroad company, although it is interested in the land, is not a party to the transaction between the United States and the state of California, and it derived no title from the United States subsequently to this transaction. The right of the railroad company was vested and perfected before this transaction. It is not a subsequent claimant. It being no party to the transaction, and not claiming by title subsequent, I think it is not an indispensable or necessary party to the suit. The sole duty to make a title is on the government. Whether it would be a proper party, it is not necessary now to determine. I think that objection should be overruled.

The next objection is that the state of California should be a party. The state of California has parted with all her interest in the lands, whatever it was, to the defendants in this case, and she now has no interest in them to be affected. I do not think she is an indispensable or a necessary party to this suit. Besides, the state of California cannot be sued. She is not subject to be sued, and could not be made a party. As to whether she would be a proper party, it is not necessary to determine; but I do not think the state of California is an indispensable party, as to any suit between the United States and her grantees. The United States have no interest in any litigation between the state and her grantees, arising out of the transactions between themselves. The demurrer is therefore overruled on that point.

It is claimed that the action is multifarious, in that each of the parties defendant has a separate patent from the state. These lands were listed to the state under one act. It is possible that they were listed at different times, but it was all done under one act, and the rights of the railroad company, the moving cause of this suit, are derived from the United States under one act. There are therefore two points of title common to all the parties. The same questions arise as to all of these defendants, and the case of each will be decided on the same issues and the same testimony. There is no difficulty, then, in litigating all the questions, and the rights of all the parties, in the same suit. In this matter of multifariousness, in equity practice, there is no definite, absolute, unbending rule. It rests very much in the discretion of the court. The litigation in this suit will prevent a multiplicity of suits. A suit brought against each defendant, respectively, would be oppressive to the government and to all parties, and be much more expensive to both. I think the bill is unobjectionable in that particular.

The statute of limitations, and that the claim is stale, are set up as grounds of demurrer, but they do not appear to be relied upon in the argument. Indeed, nothing is said on these points. The statute of limitations, if applicable as such in equity cases in the national courts, does not apply to the United States.

As to staleness, the railroad company has constantly been pressing its claim before the proper officers, and awaiting for years on the routine of the land department of the government. The department has been considering it, and the claim having gone through all stages, the secretary of the interior has finally decided that the company was entitled to the lands, and directed the commencement of this suit. The proceedings have been as expeditious as is usual in such cases, and as the nature of the case admits. I do not think the charge of staleness will lie in this matter. The case, I think, is within the rule on this point stated in *U. S. v. Minor*, already cited.

The demurrer will therefore be overruled, and the defendants allowed till the rule-day in March to answer.

---

HUNTER and others v. INTERNATIONAL RY. IMP. CO.

(Circuit Court, S. D. New York. January 27, 1886.)

SUMMONS—SERVICE—CORPORATION ORGANIZED IN ANOTHER STATE—AGENT IN NEW YORK.

If a corporation, organized under the laws of the state of Colorado, have an office in the city of New York, and nowhere else, and all the persons competent to represent it be also in New York, service may be made upon its agents in that city.

Motion to Vacate Service of Process.

*Ewing & Southard*, for plaintiffs.

*Dillon & Swayne*, for defendants.

WALLACE, J. The defendant, a corporation organized under the laws of the state of Colorado, moves to vacate the service of process for the commencement of a suit made at the city of New York, in June, 1884, upon one Morosini, as its treasurer; upon one Hopkins, as its vice-president; and upon Pearsall and Eckert, as its directors, —upon the ground that the corporation was not an inhabitant of or found within this district at the time of service.

The corporation was organized to construct certain railways and telegraph lines in the states and territories of the United States and in the republic of Mexico. Its certificate of incorporation named the city of Denver, Colorado, as its principal place of business, but also authorized it to transact its business in the city of New York. The corporators were citizens of this state, as were also its directors and officers ever since its organization.

It is alleged by the defendant that in January, 1883, it transferred its contracts and concessions to another corporation, with a view of closing up its business, and at that time made a full and final dividend to its stockholders, ceased to transact business, and has held no corporate meetings since; and also that since that time it has had no officers or offices in the state of New York.

The affidavits are conflicting upon the point whether the corporation actually ceased to transact business in January, 1883, or not. The plaintiff's affidavits assert that the corporation was actively engaged in carrying on its business until December, 1883. It is undisputed that on the twenty-fourth of February, 1883, the annual report of the corporation, made by its president, was returned according to law, thus representing it to be an existing corporation. Whether the corporation has paid all its debts is also a disputed question of fact. It does appear, however, that the corporation was not carrying on business in Colorado when the writ was served here. It had no offices or officers there except theoretically. If it had any practical existence anywhere, the only evidence of the fact is found in the circumstances that the office in the city of New York, which had always been maintained at No. 71 Broadway prior to January 18, 1883, was not closed; that the sign of the corporation was still maintained there; and that the office was occupied by those persons who had always been its officers and directors. It does not appear that these persons have ever resigned as officers or directors, and, by the organic law of the corporation, they hold over until others are elected. Of course, the corporation is not legally dissolved; but continues to exist certainly to the extent necessary to enable its creditors to enforce their claims against it. It is an inhabitant of the state of Colorado, because it must dwell in the place of its creation, and cannot migrate to another sovereignty. It may be found in another state, however, and is found there for the purposes of being sued, if it carries on business there by its agents. But it is not constructively present in a state other than that of which it is an inhabitant, for the purpose of being sued, unless it carries on business there. *St. Claire v. Cox*, 106 U. S. 359; S. C. 1 Sup. Ct. Rep. 354; *Good Hope Co. v. Railway Barb Co.*, 22 Fed. Rep. 635.

The decision must therefore turn on the point whether the defendant was carrying on business here when the process was served. Manifestly it was not engaged in business elsewhere, because all its agents were here, and except here it gave no sign of life. If it was carrying on business here, the persons served were those who represented it in carrying on such business, because it had no other agents, and because these persons, its officers and directors, had legal authority to represent it so long as others had not been chosen in their places. Negotiations between these agents, or some of them, and the plaintiffs, had been on foot up to a recent date prior to the service of process; but, aside from this, there is nothing in the affidavits to

show that the agents of the defendant had been engaged during the year 1884 in any actual business transactions for the defendant. On the other hand, it would seem that the defendant still maintained its office at No. 71 Broadway. Although it asserts in its affidavits that it had no office here, this is merely a general statement of a conclusion, unsupported by any proof that it has canceled its lease, or surrendered actual possession of the premises. The statement may be true in the same sense that the accompanying statement is true that it has no officers within this state. If it keeps an office here, the implication is that the office is needed for the transaction of business. If it has its office here, and has one nowhere else; if all those who are competent to represent it are here, and nowhere else,—it must transact here whatever affairs may arise in the exigencies of a moribund concern.

Upon the whole, it would seem that the defendant is found here. The motion is therefore denied.

---

BROOKS v. HANOVER NAT. BANK.

(Circuit Court, S. D. New York. January 28, 1886.)

1. FACTOR—PLEDGE OF MERCHANDISE—VALIDITY.

By the statute, the factor is to be deemed the true owner of the merchandise, so far as to give validity to a pledge thereof in security for a loan, if he has been intrusted with the possession of the property for the purpose of sale, or as security for advances to be made or obtained upon it.

2. WAREHOUSE RECEIPTS—NEGOTIABILITY.

Warehouse receipts, by statute, in New York, are negotiable instruments, and by indorsements transfer the merchandise for which they are given, upon surrender of the receipt.

At Law.

*Roger A. Pryor*, for plaintiff.

*Moore, Low & Wallace*, for defendant.

WALLACE, J. In October, 1881, the defendant sold certain cases of opium, of the value of \$4,412.06, which had been pledged to it by Davis & Co. in May, 1879, as security for loans made and to be made by the defendant to that firm. New loans were made after the pledge, from time to time, by the defendant to Davis & Co., upon the security of the opium, and at the time of the sale, which was made to satisfy the pledge, Davis & Co. were indebted to the defendant upon one loan of \$2,000 made February 19, 1881, and upon another loan of \$3,000 made January 4, 1881, for which the defendant also held additional security. At the time of the original pledge, the opium was the property of one Hatch, (under whom the plaintiff makes title,) and had been in the possession of Davis & Co. as his factors for sale.

They had stored it with a warehouseman, and had taken a warehouse receipt, in the usual form, by which the opium was deliverable to them or their order upon surrender of the receipt. Davis & Co. pledged the opium to defendant by the indorsement and delivery of this receipt.

This is an action of trover for the conversion of the opium, and the only question is whether the defendant acquired a good title to it under the factors' act. If, after applying the avails of the additional security taken by the defendant upon the \$3,000 loan, the defendant received from the proceeds of the sale of the opium any sum in excess of its debt against Davis & Co., the plaintiff is doubtless entitled to that sum, and can recover it in an appropriate action; but here the only question is whether the act of the defendant in selling it to satisfy the pledge was a conversion.

Manifestly, the loans were made and carried by the defendant for Davis & Co. upon the faith of the merchandise described in the warehouse receipt, and this being so the pledge made by the factors was as valid, under the provisions of the factors' act of this state, as a pledge by the owner would have been. By the statute the factor is to be deemed the true owner of the merchandise, so far as to give validity to such a contract, if he has been intrusted with certain documents of title mentioned in the statute by the owner, or if he has been intrusted with the possession of the property for the purpose of sale, or as security for advances to be made or obtained upon it. The case for the plaintiff has been placed upon the theory that the evidence does not show that Davis & Co. had ever been intrusted with the documents of title by the owner. If they had made a pledge of merchandise consigned to them which had not come to their possession, proof that they had been intrusted with such documents of title would have been essential, because these, under such circumstances, and according to the established usages of trade, give the exclusive control of the delivery of the property to the factor, and are the only evidence of title upon which third persons dealing with him have a right to rely. But where the merchandise has come to the factor's possession, actual or legal, no evidence of title is required. The purpose of the statute is to protect those who advance money to the factor upon the faith of the merchandise and his apparent ownership, as evinced either by the possession of the property or by the documentary evidence of title with which he has been intrusted by the owner. *Cartwright v. Wilmerding*, 24 N. Y. 527; *Howland v. Woodruff*, 60 N. Y. 73, 81.

Warehouse receipts, by statute, in this state, are negotiable instruments, and by indorsement transfer the merchandise for which they are given upon surrender of the receipt. If Davis & Co. had not delivered the opium to the warehouseman, or been at any time in actual possession of the merchandise, the possession was theirs in law when the warehouseman gave them the receipt. Thenceforth he recog-

nized their right of dominion, and his possession was theirs, in contemplation of law, and he held it merely as their bailee.

Judgment is ordered for the defendant.

---

GREENLEAF and others v. WORTHINGTON, Collector.

(Circuit Court, D. Massachusetts. December 2, 1885.)

CUSTOMS DUTIES—MERINO SHIRTS, ETC.—UNDER WHAT LAW DUTIABLE.

Shirts, drawers, and stockings composed in part of wool and in part of cotton, and known commercially as merino goods, are liable to an assessment of 85 per cent. *ad valorem*, under the act of August 7, 1882, (22 St. 301,) in amendment of Rev. St. § 2504, irrespective of the proportions in which the wool and cotton are combined, or the comparative value of the wool in the fabric.

Rescript.

C. L. Woodbury, for plaintiff.

Geo. P. Sanger, U. S. Atty., for defendant.

COLT, J. Under the agreed statement of facts it appears that the importations were known in trade in 1874 as merino shirts, drawers, socks, and stockings, and that the yarn was known in trade as merino yarn, and that this yarn was produced by carding together wool and cotton, and spinning, by which process a distinct article of commerce from either wool or cotton is produced, which is known and described as merino. The importations being composed in part of wool and in part of cotton, and known commercially as "merino," we do not think they should be assessed under section 2504, Schedule L, of the Revised Statutes, but that they clearly come under section 2504, Schedule M, of the Revised Statutes, amended August 7, 1882, (22 St. 301,) and are liable to an assessment of 35 per cent. *ad valorem*.

Upon the facts as presented we deem the proportions in which the wool and cotton are combined, or the comparative value of the wool in the fabric produced, immaterial and not affecting the question.

## McGUIRE v. WINSLOW and others.

(Circuit Court, N. D. New York. January 27, 1886.)

## 1. CUSTOMS—SEIZURE—LIABILITY TO FORFEITURE.

The question whether property which has been seized by the proper revenue officers of the government is liable to forfeiture under the customs laws of the United States, can only be adjudicated in the mode and by the procedure prescribed by the laws of congress.

## 2. SAME—DUTY OF OFFICER.

It is the duty of the officer to make the seizure if he has probable cause to believe the property to be forfeited.

## 3. SAME—JURISDICTION—PROPER ACTION.

The exclusive jurisdiction to determine whether property has become forfeited to the United States is vested in the federal courts, and is to be exercised by proceedings *in rem*, and it depends upon the final decree of such courts whether the seizure is to be deemed rightful or tortious.

## 4. SAME—PROCEEDINGS IN REM PRECEDE ACTION IN TRESPASS FOR FORFEITURE.

When a seizure is made for a supposed forfeiture under a law of the United States, no action of trespass lies in any common-law tribunal until a final decree is pronounced upon the proceeding *in rem* to enforce such forfeiture.

## 5. SAME — REVISED STATUTES, §§ 3074-3079, INCLUSIVE — SALES PURSUANT THERETO.

A sale of seized property pursuant to sections 3074-3079, inclusive, of the Revised Statutes, is, in legal effect and operation, equivalent to a sale under a judicial decree of condemnation.

## Action of Trover.

*Martin I. Townsend*, for defendants.

*Thomas H. Breen*, for plaintiff.

WALLACE, J. This action was commenced in the supreme court of this state, and removed to this court upon the petition of the defendants. It is an action of trover, brought to recover the value of a horse alleged to have been wrongfully taken by the defendants from the possession of the plaintiff, and converted to their own use. The defense is that the horse was imported into the United States from the dominion of Canada, in violation of law, and was subject to seizure and forfeiture to the United States; and that all the acts done in the premises by the defendants were done by them in the seizure and sale of the horse as officers of the government; the defendant Winslow as a special agent of the treasury department, and the defendant Warren as collector of the port of Cape Vincent.

Upon the trial it appeared that the horse was brought into the district of the defendant Warren, and was seized by him, with the co-operation of the defendant Winslow, upon the assumption that the plaintiff had entered the horse for importation by means of a false invoice, with intent to defraud the United States. The collector, being of opinion that the value of the property seized did not exceed \$500, caused an appraisement to be made pursuant to section 3074, Rev. St. Upon the appraisal the property was found to be of less value than \$500, and thereupon he caused publication of notice to be made in manner and form, and for the period of time, prescribed by



section 3075. No person filed any claim to the property seized, pursuant to section 3076. The collector thereupon, after the proper time had expired, gave notice of the sale of the property seized, and sold the same at public auction according to the requirements of section 3077, and thereafter he deposited the proceeds of the sale in the treasury of the United States. All the proceedings of the defendants were regular, but evidence was given for the plaintiff tending to show that the horse was not entered by means of a false invoice, and that the purchase price paid for the horse in Canada was truly stated in the invoice. By consent of counsel for the defendants the question of fact was left to the jury whether the property had in fact been entered by means of a false invoice; and the question of law whether the plaintiff could recover if the jury found against the defendants upon the issue of fact was reserved for further consideration. The jury found for the plaintiff, and the question now is whether the defendants are liable.

No precedent has been cited for such an action, and there is no principle upon which it can be sustained. The question whether property which has been seized by the proper revenue officers of the government is liable to forfeiture under the customs laws of the United States can only be adjudicated in the mode and by the procedure prescribed by the laws of congress. By legislation which embraces the whole subject of seizure and forfeiture the exclusive jurisdiction to determine whether property has become forfeited to the United States is vested in the federal courts, and is to be exercised by proceedings *in rem*; and, as was held in the early case of *Slocum v. Mayberry*, 2 Wheat. 1, it depends upon the final decree of such courts whether the seizure is to be deemed rightful or tortious. In *Gelston v. Hoyt*, 3 Wheat. 246, it was decided that if a sentence of condemnation be definitely pronounced by the proper court of the United States, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; that in either case the question cannot again be litigated in any common-law forum; that where a seizure is made for a supposed forfeiture under a law of the United States, no action of trespass lies in any common-law tribunal until a final decree is pronounced upon the proceeding *in rem* to enforce such forfeiture; that if an action be brought against the seizing officer for the supposed trespass while the suit for the forfeiture is pending, the pendency of the suit may be pleaded in abatement; that if an action be brought after a decree of condemnation, or after an acquittal, with a certificate of a reasonable cause of seizure, the decree may be pleaded as a bar to the action; and that it is only after an acquittal without such a certificate that the officer is without justification for the seizure, and the seizure is to be deemed a tortious act.

An action of trespass or trover cannot be maintained against the proper officer of the revenue for his act in making a seizure when he

v.26F.no.5—20

has probable cause to believe the property is forfeited to the United States, if he does not abandon the seizure by a failure to take the necessary steps to procure a judicial condemnation, or in cases where a formal decree of condemnation is unnecessary, unless he fails to comply with the requirements of the statute by selling the property and turning over the proceeds to the treasury. It is his duty to make seizure if he has probable cause to believe the property to be forfeited. *Averill v. Smith*, 17 Wall. 82, 91. If made with probable cause, he is entitled to the benefit of a *bona fide* possession, and is responsible only for ordinary diligence in the preservation of the property, and in bringing it in for adjudication. *Shattuck v. Maley*, 1 Wash. C. C. 245; *Burke v. Trevitt*, 1 Mason, 96.

Prior to the act of April 2, 1844, it was the duty of the collector, or other principal officer of the revenue, in making a seizure, to cause a suit for forfeiture to be commenced without delay; and the suit was tried in the district court, as now, by a proceeding *in rem*, in which all parties interested in the property could intervene, and have their day in court, and test the question whether the property was properly liable to seizure or not. But by that act it was provided that in cases of seizure of property which, in the opinion of the collector, was of the value of \$100 or less, he was to cause an appraisement to be made by two sworn appraisers, or by two competent and disinterested citizens; and if, by the appraisal, the value was found not to exceed that sum, he was to publish a notice once a week for three successive weeks in some newspaper of the county or place where the seizure was made, describing the article seized, and stating the time, place, and cause of seizure, and requiring any person claiming such article to appear, and file his claim, with such seizing officer, to the article within 90 days. The act also authorized any person claiming the property so seized, at any time within the 90 days, to file his claim with the collector, stating his interest in the article, upon his depositing with the collector a bond to the United States conditioned that, in case of the condemnation of the article so claimed, the obligors would pay all the costs and expenses of the proceedings to obtain such condemnation. The act made it the duty of the collector to transmit the claim and bond, with a duplicate list and description of the articles seized and claimed, to the United States attorney for the district, and made it the duty of the district attorney to proceed for a condemnation of the property in the ordinary mode prescribed by law. It was further provided that if no such claim should be filed, or bond given, the collector should give not less than 20 days' notice of the sale of the property seized, by publication, in the manner before mentioned, and at the time and place specified in such notice should sell the property at public auction, and should deposit the proceeds, after deducting the actual expenses of the seizure, publication, and sale, in the treasury of the United States. It was also provided that within one year after such sale any person claiming to be inter-

ested in the property sold might apply to the secretary of the treasury for a remission of the forfeiture and a restoration of the proceeds of such sale, and the same might be granted by the secretary upon satisfactory proof that the applicant, at the time of the seizure and sale, was absent out of the United States, or did not know of the seizure, and that such forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of the property; and that if no application for a remission or restoration should be made within the year, the secretary of the treasury should cause the proceeds of such sale to be distributed as in the case of property condemned and sold in pursuance of a decree of a competent court. The manifest purpose of that act was to save to the government the expense of proceedings for a judicial condemnation of property forfeited, in cases where the property was of inconsiderable value. By subsequent amendment, a change was made in the law, shortening the length of time of the publication of notice of sale, and for the filing of the claim and bond, shortening the period during which the secretary of the treasury might entertain an application for a remission, and making the proceeding applicable to all cases in which, in the opinion of the collector or other principal officer of the revenue making the seizure, the value of the property did not exceed \$500. Act July 18, 1866. As thus changed, the act of 1844 is now incorporated into the Revised Statutes as sections 3074-3079, inclusive.

It is entirely clear that a sale of seized property pursuant to these sections is, in legal effect and operation, equivalent to a sale under a judicial decree of condemnation. These provisions of law were adopted originally as a substitute for the ordinary judicial proceeding in a specified class of seizures. They contemplate a form and mode of proceeding having the ordinary characteristics of a judicial proceeding *in rem*, which is usually initiated by a seizure of the *res*, and in which personal notice to persons interested in the property is commonly dispensed with. They afford a reasonable notice by publication of the commencement of the proceeding, and of the cause of seizure, and preserve to the persons interested in the property a reasonable opportunity to assert their claim, and have their rights judicially determined. The provisions which authorize an application to the secretary of the treasury also evince the legislative intent that a sale made pursuant to these sections shall conclude the rights of persons interested in the property as effectually as they would be concluded under a judicial decree. While an opportunity is given, after the sale, to apply for a remission and restoration of the proceeds, the applicant can only be heard upon satisfactory proof that he did not know, and was excusable for not knowing, of the seizure and sale of the property. The concluding provision, directing the secretary of the treasury to distribute the proceeds of the sale "in the same manner as if the property had been condemned and sold in pursuance of a decree of a competent court," also indicates the legislative intent

that the sale is to be treated in all its incidents as a sale under a judicial decree.

For these reasons it must be held that the question whether the property in suit was properly subject to forfeiture could only be tried in the mode prescribed by the sections of the Revised Statutes referred to. It could not be determined in this suit, and a verdict should have been directed for the defendants.

---

PHILLIPS and others v. RISSEK and others.<sup>1</sup>

(District Court, N. D. Illinois. June 29, 1885.)

1. PATENTS FOR INVENTIONS — ERRONEOUS STATEMENT OF OBJECT OF INVENTION.

A patent is valid if the invention is applicable to one use, although it is not applicable to all the uses suggested by the inventor.

2. SAME—VOID REISSUE—UNWARRANTED ENLARGEMENT AFTER TWO YEARS.

Where the reissue was applied for more than two years after the date of the original, and the claims were expanded, *held*, that such reissue was void.

3. SAME—CAR AND WAGON UNLOADING APPARATUS.

Reissued letters patent No. 4,212, of December 20, 1870, to Nicholas E. Phillips, are void because for a different invention from that described in the original, No. 83,005, of October 13, 1868.

In Equity.

*Burnett & Burnett*, for complainants.

*Peirce & Fisher*, for defendants.

BLODGETT, J. By this bill complainants charge defendants with the infringement of reissued letters patent No. 4,212, issued to complainant, December 20, 1870, for "an improvement in wagon and car unloading apparatus," the original patent, No. 83,005, having been issued to Noah Swickard, October 13, 1868. The leading feature in the device is the arrangement of two tilting bars with a platform in such manner that the wheels of the wagon or car to be unloaded can be brought to rest on these bars, when, by tilting the bars, the body of the vehicle is tipped to such an angle as to cause the contents to slide or be dumped out by its own gravity. The defenses interposed are: (1) That the patent is void for want of novelty; (2) that the defendants do not infringe; (3) that the reissued patent is for a different invention from that described in the original, and is such an enlargement of the specifications and claims of the original patent as to make the reissue void.

The proof shows a number of devices, prior to that covered by this patent, for unloading cars or trucks by tilting the platform on which they stand so as to cause the contents of the car to slide out or be

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

dumped into a bin or chute; but from the proof I conclude that Swickard was the first to produce a device by which the wagon was tipped or thrown into an inclined position, by means of vibrating bars or rails, which operated in connection with a fixed or stationary platform; and this arrangement seems to be particularly adapted to dumps for unloading bulk grain from wagons drawn by teams, as the team can pass readily upon the fixed platform, the wheels being so guided as to be brought to rest upon the rails or bars forming part of the vibrating platform.

Most, if not all, the prior devices seem to have been specially adapted to unloading the contents of cars or trucks run upon railroad tracks or tram-ways; but it is noticeable that Swickard specially states that his invention is to be used for unloading wagons or cars, although he only shows it in use as arranged for unloading wagons. But it is suggested that if it is applicable to the unloading of cars it must be radically changed; that, while an ordinary farm wagon stands upon wheels at such height that a sufficient inclination can be obtained by dropping the hind end down until the rear axle strikes the fixed platform, the much smaller wheels of a car would cause the axle to strike the fixed platform before the requisite inclination was secured. It is, however, undoubtedly true that the mere suggestion of this patentee that his machine can be used "for unloading wagons or cars" would not invalidate it as a wagon unloader, even if it should require inventive genius to adapt it to the unloading of cars; that is, it may not be used to unload cars, as the word "car" is commonly used, in contradistinction to "wagon," yet it may cover a valid device for unloading a wagon, and would be valid if it is applicable to one use, even if it is not applicable to all the uses suggested by the inventor. The proof, therefore, shows that there is some advantage in using these tilting rails insted of a tilting platform. I am of the opinion that defense of want of novelty is not made out, although I feel compelled to say that, in my estimation, there is much reason for doubting whether it requires anything more than mere mechanical skill to adapt the older devices to the unloading of wagons. The patent, at least, must be construed to stand upon a very narrow basis.

As before stated, the original patent showed two platforms; that is, a fixed platform, A, and a vibrating or tilting platform, working in slots in the fixed platform, the pivoted balance bars being tied together at their forward end by a cross-board, which rested upon the fixed platform when the movable one was level with the fixed one, so that the vibrating or tilting bars could not move or act independently of each other, but must raise or lower at the same time. The cross-board or plank, C, also acted as a stop to keep the forward ends of the tilting rails from dropping below the fixed platform, while, by the arrangement of the keys, E, E, they held the rear ends of the tilting platform in place until the wagon was drawn onto them, when, by

means of a lever, these supporting keys were withdrawn, and by a slight effort, or the weight of the operator, the rear end of the movable platform was dropped to an angle required to slide the load from the wagon. Each of these tilting rails also contains a self-acting dog, G, which was intended to act as a check to prevent the wagon from running back after it had been drawn upon the platform; and, in order to guide the wagon onto the tilting platform, the lid of the hopper was made long enough to reach from inside to inside of the rail, and raised a couple of inches above the platform, so that it would serve to guide the wheels onto the tilting rails. There was also fixed to the forward ends of these tilting bars a bar or hook, which was intended to prevent the front end of the movable platform from rising higher than should be required to secure the necessary slope of the wagon for causing the load to slide out.

The claims of the original patent were:

"(1) The slotted platform, A, in combination with the pivoted balance bars, B, B, board, C, end-bars, I, I, and stops, H, H, all constructed and operating substantially as and for the purposes herein set forth. (2) The pivoted balance bars, B, B, provided with one or more self-acting dogs, G, in combination with the spring toggle keys, E, E, and key, F, all constructed and operating as and for the purposes herein set forth. (3) The arrangement of the slotted platform, A, balance bars, B, B, and lid, D, to the hopper, substantially for the purposes set forth."

It will be seen that the first claim is for the combination of these two platforms, the one fixed and the other capable of the tilting motion described, with the cross-board which tied the forward ends of the tilting rails together, and the hooks or end-bars which limited the height to which the forward end of the tilting platform could rise. The second claim is for the tilting bars, provided with one or more self-acting dogs, in combination with the keys, by which the rear of the tilting platform was held in place while the wagon was being drawn onto it; while the third claim is for the two platforms and lid of the hopper arranged so as to act as a wheel-guide.

The patent as reissued contains seven claims, and the infringement in this case is charged as to the first, fifth, sixth, and seventh claims. These claims, as to which infringement is charged, are as follows:

"(1) The tilting platform, B, in combination with platform or floor, A, as and for the purposes set forth. \* \* \* (5) The combination of platforms, A and B, with a stop device, I, for the purpose set forth. (6) The combination of platforms, A and B, with a receiving bin or chute, C, operated substantially as described, for the purpose set forth. (7) The combination of platforms, A and B, with lid, D, for the purposes set forth."

It is conceded that the defendants have constructed grain dumps with tilting rails, each pivoted and working independently of the other, substantially like the defendants' Model A, in evidence in this case, with some variation as to the mode of locking or stopping the rear end of the rails in place, and one dump, like the defendants' Model B, in which, as will be seen, the forward ends of the tilting

rails are tied together by a cross-plank; and the first question I propose to consider as to this branch of the case is whether these dumps constructed by the defendants infringe either of these claims of the reissued patent.

The first claim of the reissue is for the tilting platform, B, in combination with the fixed platform or floor, A. In the specifications of the reissue it is said the tilting platform is so constructed "as that its forward end shall rest upon the stationary platform." It must be obvious to any one who studies the operation of these devices that some way must be provided for holding the forward end of the movable platform so that it will not fall below the fixed platform. The specifications of the reissue give no instructions as to how the forward end of the tilting platform is to be constructed, so that it shall rest on the stationary platform; but the drawings show a cross-board which ties the forward ends of the two pivoted bars together, and this cross-board, when these forward ends drop to the level of the fixed platform, must rest on the fixed platform, and thus hold the movable platform level with the fixed platform. This mode of construction is clearly shown in Fig. 2 of the reissue drawing. It may, as I think, be correctly said that this mode of construction shown in the drawings is only one mode, and does not limit the patentee to that mode of construction only; that is, he may, by the reissued patent, use any mode of construction by which the forward end of the movable platform is made to rest on the fixed platform. The rails of defendants' dumps constructed according to Exhibit A rest upon a cross-timber fastened under the stationary platform; while the dump constructed according to Exhibit B shows the forward ends of the rails tied together, so that the cross-board rests on the stationary platform. It seems to me, therefore, that the dumps of the defendant infringe this first claim; that is, they use the fixed and tilting platform acting together substantially as in the reissue, because these two pivoted rails working in their respective slots, when resting upon their front and rear bearings, form a platform, and when a wagon is driven upon them it stands practically upon a platform composed of these two rails and the bearing upon which they rest. When the keys or locks of the rear ends of these rails are removed, then the platform can be tilted, and thereby the wagon put at such an angle as to discharge its load. The tie-bar shown in the defendants' dump, B, and in the drawing, is really inoperative and performs no function, if some other rest for the forward ends of the bar is provided, because these bars working in their slot are all that are needed to hold the four wheels of the wagon, and are practically a platform of themselves, without regard to a tie-board or cross-board connecting their forward end.

The fifth claim is for the combination of the platforms, A and B, with the stop device or hook, by which the platform is prevented from tilting further than is necessary to unload the wagon. The defend-

ants do not use this stop device, and therefore do not infringe this combination.

The sixth claim is for the combination of the platforms, A and B, with the receiving bin or chute. As I shall have something to say about this claim in considering the validity of this reissue, I will only say, in passing, that no special form of receiving bin or chute is shown or described in the specifications. The very idea of dumping or unloading the contents of a wagon or car presupposes that the contents are to be dumped into some receptacle; and it may well be doubted whether this claim is not too vague and uncertain to be upheld.

The seventh claim is for the combination of the platforms, A and B, with the hopper lid, D. This lid, D, as has been said, is arranged to act as a guide to run the wagon wheels upon the rails, and, as defendants use no such device, but have dropped their vibrating rails a slight distance below the surface of the fixed platform, so as to make sure of running the wheels upon the vibrating rails, they do not infringe this combination, their wheel guide being different from that provided in the patent. I therefore conclude that the defendants' dumps infringe the first claim of this reissued patent.

I now come to consider the validity of this reissue. It will be noticed that this reissue was applied for and made more than two years after the issue of the original patent, and the defendants insist that this case is by that fact brought within the cases of *James v. Campbell* and *Miller v. Bridgeport Brass Co.* Complainants insist, however, that the claims of the reissue are but a restatement of the claims of the original patent. A comparison of the original with the reissued patent shows that the specifications have been much amplified, and, to some extent, new elements are introduced into them. For instance, in the original patent it is said:

"A plank or board, C, is secured to the front end of such bars, so that they cannot work independently or separate from each other, but must raise and lower at the same time."

In the reissue it is said:

"A tilting platform, B, so constructed as that its forward end shall rest upon the stationary platform, while the rear end, consisting of beams or bars, B, shall play within the openings or slots formed in the floor, so that, when required, the rear end of the platform may descend below the line of the floor."

Here we have, as it seems to me, a radical departure from the mode of construction indicated by the original patent. The original patent required imperatively that the forward ends of these tilting bars should be fastened together so that they could not work independently or separate from each other, but must raise or lower at the same time. By omitting this element from the reissue, the patentees have caused their device to cover a device which would not be covered by their original patent. Neither the claims of the original patent, nor the specifications, seem to anticipate any other form of con-



struction than one in which the vibrating bars should be fastened together at their forward ends, so that they could not operate independently or separate from each other. By the reissue all that seems to be required is that some rest or stop shall be provided to prevent the forward ends of the vibrating rails from falling below the level of the fixed platform, and, as I have already said, the defendants so construct their dump that the forward ends of the vibrating rails rest upon a timber fastened to the under side of the fixed platform. Here is a new invention or different invention described and claimed from that described and claimed in the original patent. The original patent claimed a vibrating platform of a peculiar construction, with certain elements in it. The reissue claims a different vibrating platform, with less elements in it, and describes a vibrating platform not covered by the original specifications or claims.

As, in considering the question of infringement, I have held that the defendants only infringe the first claim of the reissue, it may not be necessary to consider the validity of the fifth, sixth, and seventh claims of this reissue; but I can hardly forbear the passing remark that the sixth claim of the reissue, which is for the combination of the two platforms with the receiving bin or chute, seems to me to be a most unwarrantable enlargement and expansion of the original patent. The original patent contained no suggestion or description of a receiving bin or chute. The only possible allusion to it is the mention of the lid to the hopper; and yet, by the sixth claim of this reissue, an element which is not in the original patent, either by description or claim, is made one of the elements of a combination. It therefore seems to me that this reissued patent must be held void, as being for an invention not described in or covered by the original patent. This patentee could not, by this reissue, add new features or omit old features, especially after the lapse of so much time from the issue of the original patent.

The proof in the case shows quite conclusively that, at or about the time of the issue of this original patent, this kind of dumps or devices for unloading wagons came into use, especially at elevators and corn-shelling warehouses at railroad stations, and it was found by practical experience that two pivoted rails so arranged that the wagon could be driven upon them, with proper stops to hold them in place, and a device for the releasing of the stop when ready to dump, was all that was necessary for the purpose, and Sypes, McGrath, and other inventors entered the field with this simpler form of dump, whereupon plaintiff sought and obtained this reissue in order to cover this less complicated construction which others had introduced and proved useful.

This bill is dismissed for want of equity.

ARON v. MANHATTAN RY. CO.<sup>1</sup>

(Circuit Court, S. D. New York. January 26, 1886.)

## 1. PATENTS FOR INVENTIONS—NOVELTY—GATE-OPERATING DEVICE.

A device for opening and closing the gates of railway cars, consisting of a link connecting a sliding rod with the gate, and a rod sliding in or on bearings secured to the guard-rail, and having a handle located within convenient reach of the attendant, does not possess patentable novelty.

## 2. SAME—JUDICIAL NOTICE OF MECHANICAL DEVICES.

Judges will take judicial notice of mechanical devices of common knowledge.

## 3. SAME—PATENTABILITY RESTS ON MEANS FOR CARRYING OUT A CONCEPTION.

Although the patentee was the first to conceive of the convenience and utility of a mechanism for opening and closing the gates of railway-car platforms, his right to a patent must rest upon the novelty of the means he contrived to carry his ideas into practical application.

## 4. SAME—INVENTION—MECHANICAL SKILL.

It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification for such use. But if the changes involve only the exercise of mechanical skill, they do not sanction a patent.

## 5. SAME—DUPLICATION.

The mere duplication of a device for operating a gate for the platforms of railway cars, whereby the gates of two adjoining platforms may be operated simultaneously, does not require invention.

## 6. SAME—PATENT NO. 288,494, OF NOVEMBER 13, 1883—RAILWAY-CAR GATES.

The first five claims of this patent are void of want of patentable novelty.

## In Equity.

*Munson & Philipp*, for complainant.

*Edwin H. Brown*, for defendant.

WALLACE, J. This suit is brought to restrain infringement of letters patent No. 288,494, granted November 13, 1883, to William W. Rosenfield, assignor. The patent relates to gates of cars in which the passengers get on and off at the sides of the platform, the gates being arranged to close the side entrances to the car platform except when the passengers are getting on and off. Such cars are in use upon the elevated railways in the city of New York. The patent describes two improvements in these gates, only one of which is involved in this controversy. This consists in operating mechanism by which the guard or attendant upon the platform of the car, while standing out of the way of incoming or outgoing passengers, and in the passage-way between two cars, can simultaneously open and close the gates of both cars. The only question litigated is whether there was any patentable novelty in this improvement.

In the general preliminary statement of the object of the invention the patentee states in his specification that—

"In many classes of railway cars, and particularly in those used upon the elevated and other city railways, it has been found necessary, in order to prevent passengers from falling from the train, and also to prevent persons

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

from attempting to get off or on the car while in motion, to provide the entrances on the car platform with gates by which they can be closed except at the proper time. As there is usually but one guard or attendant stationed between two adjoining cars, it follows that, to open or close both gates, he must pass around from one to the other of the adjoining platforms. It is the object of the present invention, among other things, to provide means by which the guard or attendant can, without changing his position, open or close both gates simultaneously, and with the least possible delay. To that end, one feature of the invention consists in providing the gates with connections so arranged that any two adjoining gates can be simultaneously opened or closed by the guard while standing in the passage-way leading from one of the cars to the other."

In the detailed description illustrated by the drawing, the platforms are arranged so that the entrances to them from the station are at the side, and are provided with the usual guard-rails, which extend across the ends except a space at the middle, which is left open to afford a passage-way from one car to the other. The side entrances to the platform are closed by gates, which are hinged to posts at the outer ends of the guard-rails, and are arranged to swing inward against the rails in opening. The devices for operating the gates are a link connecting a sliding rod with the gate, and a rod which slides in or on bearings secured to the guard-rail, with a handle which is located near the passage-way. When the platforms of two cars adjoin each other, the handles can be simultaneously grasped by the guard standing in the passage-way, one with each hand. Two arrangements of these co-operating connections are suggested in the description, and are shown in the drawing. In one, the sliding rods extend along the outside of the guard-rails, and are connected by the links to levers or arms which extend outward from the gates; the opening of the gates being effected by pushing the sliding rod. In the other, the sliding rods extend along the inside of the guard-rails, and are connected by the links directly to the gates, the opening being effected by pulling upon the sliding rod. The patentee states that the sliding rods will preferably be provided with some form of locking mechanism by which the gates can be fastened in the open or closed condition.

The claims of the patent are six in number, five of which only are in controversy, and they are as follows:

"(1) The combination, with a gate arranged to close the side entrance to a car platform, of an operating handle located at or near the inner end of the platform guard-rail, and means connecting said gate and handle, whereby the attendant may open and close the gate while standing at the end of said guard-rail, substantially as described. (2) The combination, with gates arranged to close the side entrances to the adjoining platforms of two cars, of operating handles located at or near the inner ends of the platform guard-rails, and means connecting said gates and handles, whereby the attendant may open or close both gates simultaneously while standing at the ends of said guard-rails, substantially as described. (3) The combination, with a railway car and its platform, having an end guard-rail, by which a side entrance thereto is provided, of a gate for closing said entrance, a rod, as *f*, sliding in or on guides secured to said guard-rail, and a link, as *e*, connected to said gate and rod, all substantially as described. (4) The combination, with a

railway car and its platform, having an end guard-rail, by which a side entrance thereto is provided, of a swinging gate for closing said entrance, a rod, as *f*, sliding in or on a guide secured to said rail, a link, as *e*, connected to said gate and rod, and means for locking said gate in its closed position, all substantially as described. (5) The combination, with gates arranged to close the side entrances to the adjoining platforms of two cars, of rods, as *f*, sliding in or on guides secured to the guard-rails of said platforms, and links, as *e*, connected to said gates and rods, substantially as described."

A brief reference to the prior state of the art will indicate that the combinations referred to in the several claims are merely an application to a new situation of old devices which had previously been applied to analogous uses. Devices to open and close an aperture at a distance from the operator in a great variety of forms was old. As illustrations of those things which are matters of common knowledge, and of which the court will take judicial notice, it is sufficient to allude to the strap used by the driver at the front of an omnibus to open and close the rear door; to the devices for opening or closing valves at a distance, in steam and hydraulic apparatus; and to the devices used at railway switches for opening and closing the rails.

Referring to the prior state of the art, as shown by various prior patents which have been introduced in evidence, it appears also that mechanism to open and close the entrance to passenger cars at a point distant from the operator was likewise old; as, where the operator, standing upon the front platform, employed such mechanism to open or close a door at the rear platform. One prior patent alone, the one granted to John Stephenson, September 15, 1874, shows five methods of closing and opening the rear doors of street cars from the front platform. Mechanism for closing and opening apertures at a distance from the operator, in which the same devices were employed as are employed by the patentee, was old, and is disclosed in a number of earlier patents which have been put in evidence. It will suffice to refer to two only. The patent to Woolensak, of March 11, 1873, for an improvement in transom lifters, describes the means for opening and closing the transom as consisting of a sliding rod, which is connected by a pivoted link to the arm of the transom frame. The patent to Carrigan, granted April 16, 1878, for an improvement in blind adjusters, whereby outside blinds are opened and closed without lifting the window sash, describes as the mechanism employed a sliding bar connected by a pivoted link with a hinged shutter. In both of these patents, the aperture, to be opened and closed at a distance from the operator,—in the one case a shutter, and in another a transom,—is opened and closed, as is the case in the patent in suit, by pushing or pulling the sliding rod or bar. In both of these patents there is likewise described a locking device, by means of which the sliding rod or bar is retained in a fixed position, so that the shutter or the transom will remain fastened when opened or closed, at the option of the operator; thus showing opening, closing, and locking apparatus in all essentials like that of the patent in suit.

Moreover, the patent to Carrigan shows this apparatus arranged to open and close the two shutters of the window, at the option of the operator, simultaneously; the sliding bars being so arranged as to be pushed or pulled each by one hand of the operator. Mechanism for opening and closing apertures distant from the operator, in which the devices used for the purpose are the mechanical equivalents of those employed by the patentee, is shown to be old by a large number of patents which have been put in evidence.

This partial exhibit of the prior state of the art demonstrates that what the patentee did was to adapt well-known devices to the special purpose to which he contemplated their application. It was necessary that the gate should swing inward to open and outward to close; that the sliding rod should be located where it would be out of the way of passengers entering or leaving the platform; and that the end or handle of the rod should be located where it could be conveniently operated by the attendant, without inconveniencing outgoing or incoming passengers. The new situation required adequate modifications of existing devices for opening and closing an aperture at a distance from the operator, appropriate to the new occasion. Accordingly, the patentee located the rods on bearings secured to the guard-rails, with their handles near the passage-way formed by the space or opening near the middle of the guard-rail. If this required invention, his improvement was the proper subject of a patent. He did nothing more and nothing less than this. It seems impossible to doubt that any competent mechanic, familiar with devices well known in the state of the art, could have done this readily and successfully upon the mere suggestion of the purpose which it was desirable to effect. When it was done as to one car platform, it was only requisite to duplicate it upon another to make the improvement of the patentee in all its length and breadth.

The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category. The bill is therefore dismissed.

ALBANY STEAM-TRAP Co. v. FELTHOUSEN.<sup>1</sup>*(Circuit Court, N. D. New York. February 3, 1886.)*

## 1. PATENTS FOR INVENTIONS—APPLICATION FOR REHEARING FOR NEWLY-DISCOVERED EVIDENCE.

Where patents have been sustained after animated, persistent controversy for over five years, and a petition for rehearing has been filed on the ground of newly-discovered evidence, the criticism naturally suggests itself, why was not the testimony adduced before the examiner?

## 2. SAME—EXCUSES FOR DELAY.

Excuses for delay in presenting evidence, being vague as to dates, and otherwise insufficient and unsatisfactory, a rehearing was denied.

## 3. SAME—NEWLY-DISCOVERED EVIDENCE CONFLICTING.

Where newly-discovered evidence is conflicting, it is entitled to but slight consideration, and, if offered at a late day, the cause should not be reopened to receive it.

Petition by the Defendant for a Rehearing.

*E. N. Dickerson, Jr.*, for complainant.

*Matthew Hale and E. H. Bottum*, for defendant.

Before WALLACE and COXE, JJ.

COXE, J. This action was commenced in November, 1880, the bill alleging infringement of four patents owned by the complainant. It was decided, after two elaborate arguments, in May, 1884. The decision was in favor of the defendant upon three of the patents, and in favor of the complainant upon one,—the third Blessing patent. 22 Blatchf. 169, and 20 Fed. Rep. 633. In January, 1885, both parties filed motions for a rehearing. The complainant's motion prevailed, and the cause was reargued, as to the second Blessing patent, in June, 1885, before Mr. Justice BLATCHFORD. 24 Fed. Rep. 699. For over five years, therefore, this controversy has been the subject of animated, persistent, and apparently inexhaustible litigation. In January, 1886, this motion is made by the defendant for a rehearing, on the ground of newly-discovered evidence. The criticism naturally suggests itself, why was not the testimony adduced before the examiner? Why, at least, has this motion been so long delayed? An excuse is attempted, but it is vague as to dates, and, in other respects, insufficient and unsatisfactory. Regarding that part of the petition which relates to prior sales by the defendant of steam-traps to parties in Milwaukee, it is enough to say that there can be no pretense that this testimony is newly discovered, and no reason is advanced, which at all commends itself to the court, why it was not produced before the examiner.

In addition to these considerations, we are of the opinion that such discredit is thrown upon the statements of the Albany witnesses that their testimony, were it before the court, could hardly be expected to throw much light upon the point in controversy. Several of them

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

have made affidavits for the complainant in direct conflict with those read by the defendant. Such testimony is entitled to but slight consideration, and at this late day the cause should not be reopened to receive it.

We see no reason why the complainant is not entitled to the usual decree. It would not be wise, in our judgment, to instruct the master in advance as to the course he shall pursue. Both parties will be fully protected by exceptions to his report, and, should the master be in doubt, he can, if he desires to do so, apply at any time to the court for instructions. The motion for a rehearing is denied.

WALLACE, J., concurs.

---

CONSOLIDATED SAFETY VALVE CO. v. ASHTON VALVE CO. and others.  
(Two Cases.)<sup>1</sup>

(Circuit Court, D. Massachusetts. January, 1886.)

1. PATENTS FOR INVENTIONS—BILL IN EQUITY—EXPIRED PATENT.

In a bill filed more than a year after the patent expired, an injunction was asked against the use or sale of infringing devices, should any be found in defendant's possession, and also against the use of the tools and paraphernalia of infringement made during the life of the patent for the purpose of infringement. *Held*, that the bill was not for discovery in aid of a suit at law, but was a bill for discovery and relief, and as such within the decisions in *Root v. Railway Co.*, 105 U. S. 189, and *Lord v. Whitehead*, 24 Fed. Rep. 801.

2. SAME—RICHARDSON VALVE—PATENT NO. 85,963.

On motion for preliminary injunction, complainant relied on the decision of the supreme court sustaining the Richardson patent. *Consolidated Valve Co. v. Safety Valve Co.*, 113 U. S. 157; S. C. 5 Sup. Ct. Rep. 513. *Held*, that if applicable to the present case, that decision would, of course, be conclusive; but, there being a doubt whether defendants' device came within it, a preliminary injunction was refused.

3. SAME—OFFICERS OF CORPORATION AS DEFENDANTS.

A demurrer by two of the defendants, officers of the corporation defendant, based upon the ground that they had no connection with the alleged infringement, overruled.

In Equity.

Thomas W. Clarke, for complainant.

James E. Maynadier, for defendant.

COLT, J. The bill in equity No. 2,164, brought upon patent No. 58,294, granted to George W. Richardson, which expired September 25, 1883, is not a bill for discovery in aid of a suit at law, but is a bill for discovery and relief, and as such it falls within the decisions of *Root v. Railway Co.*, 105 U. S. 189, and *Lord v. Whitehead*, 24 Fed. Rep. 801. Equitable jurisdiction is sought to be sustained on the ground that the bill seeks relief, by way of injunction, against

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

the use or sale by the defendants of any of the valves embodying the invention, should any be found in their possession, and also against the use of the tools and paraphernalia of infringement made during the life of the patent for the purpose of infringement. In a bill in equity, brought more than a year after the patent has expired, we do not see how an injunction can be granted under the allegations of the bill in respect to the matters prayed for, and we do not think the cases cited by plaintiff's counsel sustain his position. For these reasons the demurrer of the defendants must be sustained, and the bill dismissed.

The bill in equity No. 2,165, brought upon patent No. 85,963, dated January 19, 1869, granted to George W. Richardson, prays for a preliminary injunction. The complainant relies upon the decision of the supreme court, sustaining the Richardson patents. *Consolidated Valve Co. v. Safety Valve Co.*, 113 U. S. 157; S. C. 5 Sup. Ct. Rep. 513. We recognize the binding authority of that decision, and, if applicable to the present case, it is, of course, conclusive. But upon this point we have a doubt. There is much going to show that the supreme court construed the Richardson patents to cover a valve in which the outlet from the huddling-chamber was smaller than the inlet, and that this was one of the main features of the invention. In the case before us the outlet is larger than the inlet. Whatever opinion the court may come to upon a full hearing on the merits of the case, we do not think the complainant's right to a preliminary injunction so free from doubt that the court should grant it. Under these circumstances the motion must be denied.

The demurrers of two of the defendants, Ashton and Reed, officers of the defendant corporation, based upon the ground that they have no connection with the alleged infringement, are overruled. It is clear that they are proper parties to the bill.

---

NORTON DOOR CHECK & SPRING CO. v. ELLIOTT PNEUMATIC DOOR-CHECK CO. and others.

(Circuit Court, D. Massachusetts. December 4, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—MACHINES FOR CLOSING DOORS WITHOUT SLAMMING.

Patent No. 144,926, granted to F. H. Richards, November 25, 1873, for improvement in door-springs, and No. 251,790, granted to Lewis C. Norton, January 3, 1882, for improvement in door-checks, compared with Elliott's patent, and *held*, that the second claim of the Richards patent is infringed thereby, but that the first claim of the Norton patent is not infringed thereby.

In Equity.

Chauncey Smith and Geo. O. G. Coole, for complainants.



*James E. Maynadier*, for defendants.

COLT, J. The defendants are charged with infringement of the patent granted to F. H. Richards, November 25, 1873, numbered 144,926, for improvement in door-springs; also with infringement of the patent granted to Lewis C. Norton, January 3, 1882, numbered 251,790, for improvement in door-checks.

The invention of Richards has for its object a machine for closing doors quickly without slamming, and it consists in the employment of a group of devices for producing an air cushion, so as to check the movement of the door just before it closes, and thus prevent it from slamming. We find in the Richards machine a cylinder of proper length, closed at one end, a packed piston capable of traveling in the cylinder, a spring exerting a pressure upon the piston, suitable means for allowing the air to enter freely and escape slowly from the air chamber in the closed end of the cylinder, and means for mounting the piston and cylinder upon the door and its jamb. When the door is released the spring will drive the piston forward, and the piston will impart its motion to the door. At first, but little resistance will be offered to the motion of the piston, because the air is compressible; gradually, however, as the escape vent in the end of the cylinder is small, the air will be more and more compressed, until it will counteract the force of the spring and the momentum of the door, and the door will almost stop for an instant, and then close slowly as the air escapes through the vent. The charge of infringement is confined to the second claim of the patent, which is as follows:

"2. The grooved screw, I, for adjusting the vent, in combination with the packing, H, piston, G, tube, D, and coiled spring, F, or equivalent, substantially as herein shown and described."

It is clear that the elements mentioned in the foregoing claim are found in the Elliott, or defendants', machine, and that the Elliott machine accomplishes the same result, of checking the motion of the door in closing, in substantially the same manner as the Richards machine. Stress is laid upon the fact that in the Richards machine the cupped packing performs the double office of a packing and a valve, to admit the air as the piston moves back, and which closes when the piston moves forward; while Elliott has a piston with cupped packing, and a valve in the center of the piston, for the purpose of admitting air to the cylinder during the backward stroke, and confining it during the forward stroke. We think it may be said, however, that these devices were known substitutes for each other. We must also bear in mind that Richards was the first to organize a machine to check the motion of a door just before it closes, and thus prevent slamming; and that, therefore, his patent is entitled to a broad construction. These considerations lead us to the conclusion that the defendants have not escaped the charge of infringement of the second claim of the Richards patent by the form

of valve employed. The evidence does not sustain the defense that the double duty of a packing and valve performed by the cupped packing in the Richards machine renders it inoperative, though undoubtedly the use of a valve in the piston, together with the packing, as employed by Elliott, makes a more efficient machine. The Richards machine appears to be a practical working device, whatever its commercial value may be.

Several patents are referred to as anticipations of Richards' machine. The Richards device is both a door-spring and a door-check. The prior Ovenden patent does not appear to describe any spring; and, further, it has no adjustable vent. The machine operates by allowing the air confined in a cylinder closed at both ends to leak past the piston, the air being confined in the compressed-air chamber until the piston has reached a certain point of its stroke, when it is allowed to escape past the piston, thus relieving the piston from all resistance. This is not the air-cushioning device of the Richards patent, which operates to arrest the motion of the door just before it closes, to prevent it from slamming, and then allows it to proceed to close effectively. In the Shaw patent there is no checking device, such as is contained in the Richards machine. The Harrison patent, dated July 6, 1869, and the Moore patent, of August 10, 1869, for water-closet valves, are also introduced as anticipating the Richards device, or for the purpose of limiting the second claim of the patent. We consider the mode of operation of the Harrison and Moore valve-cocks so essentially different from the Richards machine that they cannot fairly be held to anticipate it. Some portions of the mechanism employed are also substantially different. The devices of Harrison or Moore cannot be used, practically, for door-checks. There is not sufficient analogy between the devices and their uses to justify the conclusion that there was no invention in what Richards did, nor to warrant us in limiting the invention of Richards to the grooved screw for adjusting the vent.

We now come to the consideration of the second branch of the case, —whether the defendants infringe the Norton patent. The Norton is an improvement upon the Richards machine. The patent states that the invention described consists chiefly in the combination of a door-check with a door and jamb, by means of certain connecting and operating mechanisms, "all so arranged together that when the door is being closed at a constant rate of speed there will be a material increase in the rapidity with which the piston is driven home, as the door nears the jamb, and consequently the resisting or cushioning power of the air in the cylinder in front of the piston will not materially affect the motion of the piston until the piston is driven nearly home, and the door is about to strike the jamb." In the Norton patent the cylinder is hinged to the jamb, and there is a crank-arm, called the guide-rod, to control the piston stroke, and a connecting arm to operate the piston-rod. The two arms are connected by brack-

ets to the door and jamb. One end of the connecting arm has a flattened surface, which the patent calls a disk. To the lower part of this disk is pivoted the piston-rod, and to the upper part of it is pivoted the guide-rod. These two pivots are termed respectively *h* and *h'*. The specification says that the purpose of the guide-rod is to control the length and direction of the piston stroke, and its pivot, *h'*, acts as a fulcrum upon which the connecting arm turns, "and which is necessary for the proper working of the device; \* \* \* the leverage acquired by the use of these two pivots being sufficient to do away with any fear of a dead point" when the door is open wider than a point at right angles to the jamb.

In the Elliott machine we find two arms pivoted together and connected to brackets on the door and jamb. The piston-rod is hinged and the cylinder is set parallel with the jamb. But Elliott uses only one pivot in place of two. Norton, in his specification, considers two pivots necessary to the proper working of his device. If the first claim of the Norton patent, which is the only one in controversy, embraces a connection between the two arms and the piston-rod, where two pivots are used for a purpose which the patentee regards as necessary for the proper working of his device, and if Elliott uses but one pivot, he does not infringe, because he does not employ the same elements, or their equivalents, in combination.

The first claim of the Norton patent is for the combination with a door and its jamb of a compressed-air door-check, provided with an arm whereby its piston-rod may be operated, a guide-rod whereby the stroke of its piston will be controlled, and suitable devices for attachment of the arm, guide-rod, and door-check to the door or its jamb; *all connected and operating together substantially as and adapted for the purposes set forth*. In our opinion, this claim, taken in connection with the specification and drawings, includes, as a part of the mechanism therein described, the two pivots by means of which the arm is connected, first to the guide-rod and then to the piston, and the defendants, not using this device, do not infringe. The single pivot of Elliott is not the equivalent of the two pivots in the Norton machine. The fact that the Norton machine may be operative with the use of one pivot, does not meet the point.

We deem it unnecessary to dwell upon the other defenses which are urged. Our conclusion is that the Elliott machine infringes the second claim of the Richards patent, and that it does not infringe the first claim of the Norton patent. Decree for complainants.

ADAMS and others v. BRIDGEWATER IRON Co. and others. (No. 1,430.)<sup>1</sup>

AMERICAN TUBE WORKS v. SAME. (No. 1,428.)

(Circuit Court, D. Massachusetts. February 3, 1886.)

1. PATENTS FOR INVENTIONS—SUIT IN EQUITY ON EXPIRED PATENT.

A bill was filed to recover damages for infringement during the original term of a patent, which term had then expired, and equitable jurisdiction was sought to be maintained on the ground of the intricacy of the account. *Held*, following *Lord v. Whitehead*, 24 Fed. Rep. 801, that, in actions of tort, the mere intricacy of the account does not furnish a ground for equitable interference, and that the bill must be dismissed.

2. SAME—BILL FILED TWENTY-THREE DAYS BEFORE PATENT EXPIRED.

A bill was filed July 10th on a patent which expired August 2d following. A perpetual, but not a provisional, injunction was prayed. *Held*, that the fact that no preliminary injunction was asked for was not material, as complainants had a right at any moment to amend their bill and pray for a provisional injunction.

3. SAME—EQUITY JURISDICTION.

This case was cognizable in equity at the time the bill was filed, and it was not impossible to have obtained equitable relief during the life of the patent. It was not a mere device to transfer a plain jurisdiction at law to a court of equity, as where the patent has only several days to run.

4. SAME—ESTOPPEL—ACTS OF PATENTEE AFTER ASSIGNMENT.

By contract in writing made between patentee and defendants it was agreed defendants did not infringe the patent; but prior to the date of said contract the patentee had granted to complainants an exclusive license for the original term of the patent, and agreed to assign to them the extended term, which he did subsequent to the making of the contract. *Held*, that at the date of the contract complainants had vested in them the entire right to the patent for the extended term, and that right could not be disturbed by any act of the patentee.

5. SAME—FREEBORN ADAMS PATENT, No. 24,915, AUGUST 2, 1859, CONSTRUED.

The patent claimed, as a new article of manufacture, a tube or cylinder cast out of copper, and free from blow-holes and other similar defects, when produced as therein stated. *Held*, that the claim was limited to a particular product, when produced in a particular way.

6. SAME—NOVELTY.

This patent described apparatus whereby the stream of molten copper was deposited in the annular space of a cylindrical rotating mould, so as to fall in subdivided portions all around, intermittently, in such manner as to allow the gases to escape and thus avoid blow-holes. In the prior patents the centrifugal force of rotation, and not patentee's method of distribution, was relied on to make a more perfect cylinder. *Held*, that the Adams patent possessed patentable novelty over what was shown of the prior art.

7. SAME—WORDS "FREE" AND "PERFECT" CONSTRUED.

The specification of the patent contained the words "a perfect cast copper cylinder," and the claim, the words "free from blow-holes and other similar defects." *Held*, that the claim must be construed to mean a cast copper cylinder so free from blow-holes as to be considered sound,—sufficiently perfect to be used in the arts for the purposes for which copper cylinders are used,—and such standard of perfection is sufficiently definite.

8. SAME—EQUIVALENTS—INFRINGEMENT.

In the casting of copper cylinders a basin, rotating on top of a stationary mould, is the equivalent of a rotating mould, as the molten metal is distributed in the mould in the same manner substantially by each of the devices.

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

**In Equity.**

*Geo. L. Roberts and Geo. Wm. Estabrook*, for complainants.

*D. Hall Rice*, for defendants.

COLT, J. These bills in equity are brought for infringement of letters patent No. 24,915, granted to Freeborn Adams, August 2, 1859, for improvement in casting copper cylinders. One suit is brought for infringement during the original term of the patent, and the other suit for infringement during the extended term.

At the outset it is necessary to consider certain special defenses to these suits. The original term of the patent expired August 2, 1873, and it is urged that this court has no jurisdiction of the suit covering the original term. We think this objection well taken. A bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained. *Root v. Railway*, 105 U. S. 189. The plaintiffs seek to invoke equitable jurisdiction on the ground of the intricacy of the account, and that, consequently, their remedy at law would be inadequate and incomplete. We have recently held, in the case of *Lord v. Whitehead & Atherton Mach. Co.*, 24 Fed. Rep. 801, that in actions of tort the mere intricacy of the account does not furnish a ground for equitable interference. *Hipp v. Babin*, 19 How. 271; *Root v. Railway Co.*, *supra*; *Parrott v. Palmer*, 3 Mylne & K. 632, 642; *Higginbotham v. Hawkins*, 7 Ch. App. 676; *Smith v. London & S. W. Ry. Co.*, Kay, 408. The suit brought for infringement during the original term of the patent must be dismissed.

To the second suit, covering the extended term, the defendants urge the same objection of want of jurisdiction. Suit was begun July 10, 1880, and the extended term of the patent expired August 2, 1880. The bill prays for a perpetual, but not for a provisional, injunction. The fact that no preliminary injunction was asked for we do not deem material. The bill prays for a perpetual injunction, and the plaintiffs had a right, at any moment, to amend their bill and ask for a provisional one. The case was cognizable in equity at the time the bill was filed, and it was not impossible to have obtained equitable relief during the life of the patent. It was not a mere device to transfer a plain jurisdiction at law to a court of equity, as the courts have held where the patent has only several days to run. *Dick v. Struthers*, 25 Fed. Rep. 103; *Toledo Mower & Reaper Co. v. Johnston Harvester Co.*, 24 Fed. Rep. 739; *Mershon v. Pease Furnace Co.*, 24 Fed. Rep. 741; *Gottfried v. Moerlein*, 14 Fed. Rep. 170; *Betts v. Gallais*, L. R. 10 Eq. 392; *Burdell v. Comstock*, 15 Fed. Rep. 395; *Davis v. Smith*, 19 Fed. Rep. 823.

Another special defense set up is a contract dated June 16, 1873, between the defendant company and Adams, the patentee, whereby it was agreed, among other things, that the making of copper tubes and cylinders, as practiced by the Bridgewater Iron Company, was not an infringement of the Adams patent. Whatever force, if any, this contract may have as between Adams and the defendant com-

pany, we do not see, under the circumstances, how it can affect the rights of the complainants. On March 27, 1862, Adams gave an exclusive license covering the original term of the patent to the complainants. On December 8, 1869, he agreed to assign the extended term to the complainants, which was subsequently done September 1, 1873. The subsequent assignment was but the fulfillment of the prior contract of December 8, 1869, and did not alter the rights of the parties. The fact that the extension had not been granted at the time the contract was made does not affect the case, for the assignment of an extension before the same is granted vests the extension in the assignee. It follows that at the date when Adams made his contract with the defendant company the complainants had vested in them the entire right to this patent for the extended term, and that right Adams could not disturb by any act of his. *Railroad Co. v. Trimble*, 10 Wall. 367; *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452; *Hendrie v. Sayles*, 98 U. S. 546.

This brings us to the consideration of the Adams patent and the question of infringement. The patent relates to an improvement in casting copper cylinders. The specification says: "Great difficulty is experienced by workers in copper in making castings of this metal, such castings being liable to be filled with imperfections and blow-holes, and the efforts heretofore made to remedy this evil have not been attended with success." The patent describes a vertical cylindrical mould provided with a cylindrical core, concentrically placed so as to form an annular mould cavity which is open and substantially unobstructed at the top, and rotating concentrically upon a vertical axis. By this means the stream of metal flowing downward at a given point above the annular mould cavity enters the latter continuously, as it is revolved, at any point of its open annular area, as the same is by the rotation of the mould successively brought under the given point of the falling stream. The patent says:

"I am aware that rotating moulds have been used; I make no claim whatever to them. But what I do claim (as a new article of manufacture) is a tube or cylinder, cast out of copper, and free from blow-holes and other similar defects, when produced as herein stated."

The scope of the patent, as claimed by the patentee, seems to be clear. It is for a new article of manufacture in the form of a cast copper tube or cylinder, free from blow-holes and other similar defects, when produced as described. Adams has limited himself in his claim to a particular product, when produced in a particular way. To become an infringer, therefore, it is necessary, not only that the article described should be produced, but also that there should be employed substantially the same means to accomplish the result.

The defenses to the patent are two: want of novelty in view of the prior state of the art, and non-infringement. Adams discovered a new method of distributing the metal by which a large percentage of good copper tubes can be obtained. He made a great advance in the

art of casting copper. We have carefully examined the various prior patents introduced by the defendants as anticipations of Adams, and we nowhere find the method of distribution employed by him. Rotating moulds were old, and Adams expressly disclaims any claim to them; but the apparatus described in the Adams patent, whereby the stream of molten copper is deposited in the annular space of a cylindrical mould so as to fall in subdivided portions all around, intermittently, in such manner as to allow the gases to escape and thus avoid blow-holes, is seen in no prior patent. In the prior patents of the Eckhardt type (an English patent granted in 1809) it is the centrifugal force of rotation, and not the Adams method of distribution, which is relied upon to make a more perfect cylinder. Eckhardt says: "The centrifugal force of the rotation causes the fluid to press against the interior surface, and renders the cast more perfect and neat." The defendants urge that Fig. 1 of the Eckhart patent shows an apparatus like that of Adams, except as to the perforated core-bar, but we do not think this is proved. We do not find in the Eckhardt patent either the mode of operation or the apparatus of Adams. So in the Needham patent for casting car-wheels, of December 22, 1879, there is employed centrifugal force generated by rotation, and not the distribution of Adams. The same may be said of the French patent of Grand, dated June 2, 1854. The French patent to Estinant bears little or no resemblance to the Adams method. We deem it unnecessary to refer to other patents introduced by defendants. Our conclusion is that the defendants have failed to make out want of novelty in the Adams invention, based upon the prior state of the art.

The question of infringement remains to be considered. The defendants contend that they have never made or sold the article of manufacture covered by the Adams patent. The patent, they say, is for a cast copper cylinder free from blow-holes, while all their cylinders contain blow-holes. The specification contains the words "a perfect cast copper cylinder," but this language must be taken in connection with the claim, which says, "free from blow-holes and other similar defects." It is blow-holes which are defects, or which render the copper tubes unmerchantable, which are here fairly intended. It would be a narrow construction to put upon the Adams patent to hold that it only covered a cast copper cylinder absolutely free from blow-holes. Probably no such cylinders were ever made by any process. It is a practical question. The claim must be construed to mean a cast copper cylinder so free from blow-holes as to be considered sound; that is, sufficiently perfect to be used in the arts for the purposes for which copper cylinders are used. The defendants object to any such standard of perfection on the ground that it is variable, but we deem it sufficiently definite. If it should be found that the defendants use the Adams process, they should not be allowed to shield themselves from the charge of infringement on the

ground that the cylinders they produce, though merchantable and sound, practically speaking, are not absolutely free from blow-holes.

The defendants deny the use in the casting of copper cylinders of the process shown in the Adams patent. In the Adams device the mould rotates, while the defendants rotate a basin on top of the mould. But the rotation of the basin on the top of the mould distributes the metal in the mould in the same manner, substantially, as is done by rotating the mould. What Adams accomplishes by the rotation of the mould the defendants accomplish by the rotation of the basin on top of the mould. We are aware that the defendants deny this. Their position is that the rotating basin causes a different distribution from the method of Adams; that so far from distribution being caused by the rotation of the basin, there is less distribution when the basin rotates than when it is stationary. They further contend that the purpose for which a rotating basin is used, is to prevent the iron of the basin from melting off and injuring the casting as the molten copper is being poured. In spite of this contention on the part of the defendants we think the complainants have shown, by careful experiments, that by rotating the basin the metal is distributed in substantially the same way as by rotating the mould in the manner described by Adams, and that, therefore, the defendants use the Adams process.

Again, the argument is pressed by the defendants that the good results they experience in casting copper tubes are due to the use of flux in the molten metal, which they say acts chemically; to better sand for cores; or to whitening for covering the cores. We may admit all these things to be improvements, and yet there is infringement, if they use, in connection with these things, the method of distribution first pointed out by Adams. We know that the defendants undertake to prove that the results are equally good whether the basin rotates or is stationary; and that if they use a stationary plumbago basin, which will not melt like iron, they produce a casting as free from blow-holes as when the basin is rotated. We cannot but doubt this, because the complainants prove that by the Adams method of distributing the metal caused by rotation a very large percentage of sound copper tubes were produced, when previously, by the *great* weight of testimony, the percentage was small; and because it is further shown that by rotating the basin the defendants do substantially the same thing.

In our opinion, the complainants have made out a case of infringement, and a decree should be entered in their favor in the bill, covering the extended term of the Adams patent. The bill brought upon the original term of the patent must, for the reasons before given, be dismissed.

No. 1,430, bill dismissed; No. 1,428, decree for complainants.



HOYT and others v. SLOCUM and others.<sup>1</sup>*(Circuit Court, D. Massachusetts. February 2, 1886.)*

## 1. PATENTS FOR INVENTIONS—BOTTLE-WASHING MACHINE—NOVELTY.

Patent No. 213,583, of March 25, 1879, to Miles and Lovett, is the first patent to show the whole group of instrumentalities which go to make a practical and complete bottle-washing machine.

## 2. SAME—ANTICIPATION—ABANDONED EXPERIMENT.

To anticipate a patent issued in 1879 the defendants introduced evidence of two machines constructed prior to 1873. One of these machines was used for a limited period by the inventor, mostly in experimenting, when it was thrown aside, and the other was sold to a person who used it at times during several months, when it was also abandoned. *Held*, that these machines were abandoned experiments.

## 3. SAME—EQUIVALENTS—INFRINGEMENT.

The fourth claim of the patent sued on specified as one element of a combination of parts in a bottle-washing machine "a fixed or stationary water supply pipe," the object of which was to deliver water to the brush used in washing the bottle. Defendants used a revolving water supply pipe, but it was joined to a stationary pipe, a stationary pipe being essential in such machines. *Held*, that these devices were fairly equivalents, and that defendants infringed.

## 4. SAME.

This claim also specified a funnel-mouthed sleeve, adapted to be revolved. In defendants' machine the mouth-piece and the sleeve were in two pieces, the mouth-piece being stationary and the sleeve adapted to be revolved. The functions of the two devices were the same. *Held*, that the differences were not substantial, and that the defendants infringed.

## In Equity.

*Livermore & Fish*, for complainants.

*Geo. D. Noyes*, for defendants.

COLT, J. This suit is brought for infringement of letters patent No. 213,583, granted to Miles and Lovett, March 25, 1879, for a machine for washing bottles. The complainants derive title to the patent by assignment.

While we find other machines for washing bottles previous to the invention of Miles and Lovett, all of them were more or less imperfect or incomplete. In the patented machine we see organized for the first time the whole group of instrumentalities which go to make a practical and complete bottle-washing machine. This group consists of a water supply pipe; a brush or scraper, which is rotated at the end of a shaft, and which has the capacity of compression and expansion; a funnel-shaped mouth-piece against which the neck of the bottle is to be placed; and a sleeve into which the brush is withdrawn, and which will rotate with the brush when it is not in use, and thus save it from wear. In the prior patents referred to there are some of these devices, but in none of them do we find the sleeve within which the brush is withdrawn, and which rotates with the brush so as to protect it from wear. This is an important feature in the machine, and a great improvement over any prior machine.

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

The defendants have introduced what is called the Harvey machine as an anticipation of the patented device. The Harvey machine, however, contains no provision for supplying water to the bottle. But it is claimed that it had a sleeve for holding the brush and protecting it from wear. From the fact that the Harvey machine was only used for a limited period by the person who invented it, and whose business made it necessary for him to wash bottles, and was then abandoned, the inference is a fair one that it was found not to be worth using. Harvey himself testifies that it was used mostly in experimenting. Another Harvey machine was sold to James S. Hazard, of Newport, Rhode Island. He testifies to the use of the machine at times during several months, and to its abandonment principally because it ran so hard. All this happened previous to 1873. Both these Harvey machines were thrown aside after a short time, and they may fairly be considered as abandoned experiments; at least the priority of the Harvey machine has not been proved with that clearness and certainty which are necessary.

We now come to the question of infringement. The fourth claim of the patent is as follows:

"(4) The combination, in a bottle-washer, of a fixed or stationary water supply pipe; a sleeve-shaft mounted upon and adapted to be revolved about said stationary pipe; a brush or scraper attached to the end of said sleeve-shaft, and adapted to be revolved therewith about the end of said pipe, and to be compressed to enter the neck of the bottle, and to expand to the largest interior diameter of the bottle; and a funnel-mouthed sleeve, mounted upon and surrounding said sleeve operating shaft, and inclosing the brush, and adapted to be moved endwise on said driving-shaft to uncover the brush, and to be revolved with said shaft by frictional contact therewith, or be prevented from revolving by frictional contact with the neck of the bottle, substantially as and for the purposes described."

Instead of the fixed or stationary water supply pipe, and a sleeve-shaft mounted upon and adapted to be revolved about the stationary pipe, the defendants have substituted a revolving water supply pipe, covering the brush at its forward end and joined at its rear to the stationary supply pipe. These devices are fairly equivalents. The object is to deliver the water to the brush, and a stationary supply pipe is essential to any machine into which water is to be delivered. The stationary pipe may either extend to the point where the brush is at work, as in the patent, or there may be joined to the stationary pipe a revolving pipe through which the water is carried to the point of delivery. The substitution of one means for the other does not constitute a material difference.

The main difference between the two machines relates to the encircling sleeve into which the brush is withdrawn. In complainants' machine the sleeve revolves by frictional contact with the revolving brush. The funnel-shaped mouth-piece is attached to the sleeve, and therefore revolves with it until, by the pressure of the bottle against the mouth-piece, the friction which moves it is overcome. When the

bottle is pressed against the sleeve, or its funnel-shaped mouth, or the brush leaves the sleeve, in the process of washing, it ceases to rotate. In defendants' machine the flaring mouth and sleeve are cut into two parts. The mouth-piece is stationary, and the sleeve is revolved positively by the pully which revolves the brush. In the two machines, however, the functions of the mouth-piece and the sleeve are the same. Both machines have a funnel-shaped mouth at the end of a shaft to receive the neck of the bottle. In both the sleeve rotates when the brush is withdrawn from the bottle, thus preventing the wear of the brush. Under these circumstances, whether the mouth rotates or not with the sleeve, it seems to us, is immaterial. The other differences between the two machines can hardly be considered important. We do not think this patent, bearing in mind the advance in the art therein shown, should receive the narrow construction sought to be put upon it by the defendants. We are of opinion that the defendants infringe the fourth claim of the patent by the use of substantially the same means or the equivalents to accomplish the same result. The fact that the machines made and sold by the complainants show some changes as compared with the patent is immaterial. Decree for complainants.

---

SHAW RELIEF-VALVE CO. v. CITY OF NEW BEDFORD.<sup>1</sup>

(Circuit Court, D. Massachusetts. February 2, 1886.)

1. PATENTS FOR INVENTIONS—AUTOMATIC RELIEF-VALVES.

Patent No. 101,814, of April 12, 1870, to Arthur M. Black, and patent No. 120,958, of November 14, 1871, to James Garland, construed, and *held* that, in view of what prior inventors had accomplished, said patents must be limited to the specific mechanisms described, or their equivalents.

2. SAME—INFRINGEMENT.

Valves made in accordance with the description in patents No. 184,435, of December 31, 1872, and No. 143,920, of October 21, 1873, to Alvarado Mayer, do not infringe either the Black or the Garland patents.

In Equity.

*Chas. H. Drew*, for complainant.

*Sprague & Hunt* and *L. Le B. Holmes*, for defendant.

COLT, J. This suit is brought for infringement of two patents for improvements in automatic relief-valves: one granted to Arthur M. Black, April 12, 1870, and the other granted to James Garland, November 14, 1871.

Many prior patents for valves are introduced by the defendant. Their examination shows that, in view of what prior inventors had accomplished, the Black and Garland patents must be limited to the

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

specific mechanism, or its equivalent, described in the patents. It is apparent, on inspection, that the defendant's valve, made under the Mayer patents, dated December 31, 1872, and October 21, 1873, is widely different in construction from the valve of Black. In both devices we find what is common to most safety or relief valves, namely, a pressure chamber, safety-valve, spring at the valve-seat, and means for adjusting the spring; but in defendant's valve we find no clamp for retaining the relief-valve in position until the safety-valve causes the clamp to open, nor is the relief-valve provided with any spring, or its equivalent. Aside from certain elements common to most safety-valves, the specific mechanism of the defendant's device is substantially different from that described in the Black patent. The broad claim of the Black patent must be limited to the particular mechanism described and shown in the specification and drawings.

Nor does the defendant's valve infringe the Garland patent. It is organized in a substantially different way from the Garland valve. It has two pistons instead of one, each working in its own cylinder over the relief-valve and above the water-way; and there are other material differences in construction, which we do not deem it necessary to detail. Whether the same "equilibrium of pressure" is accomplished by both devices is doubtful; but, however, this may be, the means employed are substantially unlike.

A decree must be entered dismissing the bill.

---

### ROEMER v. NEUMANN and others.

(Circuit Court, S. D. New York. January 14, 1886.)

#### 1. PATENTS FOR INVENTIONS—INTERLOCUTORY DECREE.

An interlocutory decree, entered *pro confesso*, finding the patent valid, awarding an injunction, and referring the case to a master to take an account of profits and damages, is not definitive. No appeal lies from it, and it is still in the control of the court.

#### 2. SAME—RELEASE OF PROFITS AND DAMAGES.

A release of profits, damages, and costs having been signed at the time of the entry of the interlocutory decree, complainant was in a position to have such decree made final.

#### 3. SAME—DISTINCTION BETWEEN FINAL DECREE AND STIPULATION.

The distinction between a final decree and a stipulation upon which such a decree may be entered, is obvious. The sanction of the court to the agreement of the parties is necessary to give such agreement the effect of a final decree.

#### 4. SAME—INTERLOCUTORY DECREE AS AN ESTOPPEL.

In a prior suit between the same parties, an interlocutory decree, *pro confesso*, awarding an injunction and a reference to a master, had been entered, and a release of profits and damages signed. In a subsequent suit between the

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

same parties, exceptions setting up this decree as an estoppel were overruled, in the absence of an express authority on the question; and *held*, that where there is a doubt in such a case, it ought to be resolved against the party urging the estoppel.

This case came up for hearing on exceptions to defendants' answer. The complainant had brought suit in the circuit court for the district of New Jersey, in 1880, against the same defendants, for infringement of his patent, No. 195,233. A decree *pro con.* was entered in that suit, and a written agreement entered into between the parties whereby the complainant waived damages, profits, and costs; but a perpetual injunction was issued and served. Afterwards, in 1881, the complainant moved, in the New Jersey suit, to attach defendants for contempt of court for their violation of the injunction. Judge Nixon, in denying that motion, wrote in his opinion as follows:

"At the time that the decree *pro con.* was allowed against the defendants, the complainant signed a paper releasing them from all claim for damages and profits. Possibly both parties were acting under a misapprehension, and the best solution of the case, in my judgment, is for both to agree that the decree should be opened, the release of damages canceled, and the suit proceed to a final hearing. At all events, I am not willing, on the evidence taken, to make the rule to show cause why the defendants should not be attached for contempt, absolute."

Upon this opinion being rendered, the parties, failing to agree that the decree be opened, as suggested by Judge Nixon, suit was brought in the circuit court for the Southern district of New York, by the complainant against the same defendants, for infringement of the same patent, the bill limiting the discovery to infringements committed after the entry of the decree in New Jersey. In their answer the defendants deny the validity of the patent, and offer proof to sustain such a defense. To this part of the answer complainant filed exceptions, on the ground that the decree *pro confesso*, and the agreement accompanying the same, had determined the validity of the patent as far as the parties to this suit are concerned.

*Briesen & Steele*, for complainant.

*Frederic H. Betts*, for defendants.

Coxe, J. That the decree relied on by the complainant as an estoppel is interlocutory in form is manifest. It is, on its face, called an interlocutory decree. It leaves open the question of profits, damages and costs, and orders a reference to a master. It does not put an end to the cause. An appeal from it will not lie. It is still in the control of the circuit court. It has never been modified, and no other decree has been entered. But the complainant contends that, though it may not be definitive in form, it is so in fact, for the reason that the complainant, at the time of its entry, signed a paper releasing the defendants from all claims for profits, damages, and costs. There is nothing in the record to show that this release was filed or brought to the attention of the court at the time of the entry of the decree. It is, however, alleged in the complaint, and admitted in the an-

swer, that it was signed. The complainant was, therefore, quite likely, in a position, upon exhibiting this release, to have the interlocutory decree made final, provided the opinion was not then entertained which the court expressed later, that "possibly both parties were acting under a misapprehension." The situation in this respect was as if the master, after hearing the parties, had made a report that there were no damages or profits. Upon presenting such a report, costs being waived, the court, although it might refuse to do so, would, in all probability, order a final decree for the complainant. The difficulty is that this decree, though it might have been made final, was not so made. The distinction is obvious between a final decree and a stipulation upon which such a decree may be entered. The sanction of the court, even though a formal supplement to the agreement of the parties, was necessary. In the absence of an express authority, the court should hesitate before holding that such a decree is *res judicata*. If there is a doubt, it ought to be resolved against the party who urges the estoppel. A mistake in so deciding can be hereafter corrected; whereas, if the principal defenses are stricken from the answer erroneously, the defendants will be remediless.

The exceptions are overruled.

---

### AMERICAN TUBE-WORKS v. BRIDGEWATER IRON Co. and others.<sup>1</sup>

(Circuit Court, D. Massachusetts. February 3, 1886.)

1. PATENTS FOR INVENTIONS—GUTHRIE PATENT, No. 125,044, OF MARCH 26, 1872.

This patent was for an improvement on the patent to Freeborn Adams, for casting copper tubes, sued on in *Adams v. Bridgewater Iron Co.*, ante, 324; and such improvement consisted in an upright mould in combination with a chamber or vessel into which the molten metal was poured, and arranged to be rotated. The first claim of the patent covering this combination *held* valid, and infringed by defendants in the use of a rotary chamber or basin in combination with a stationary mould.

2. SAME—IMPLIED LICENSE.

The inventor and patentee having supervised and directed the building of a machine for the defendant company, and while in its employ, *held*, under such circumstances, the defendant company may be said to have a license to use that particular machine.

In Equity.

Geo. L. Roberts and Geo. Wm. Estabrook, for complainants.

D. Hall Rice, for defendants.

COLT, J. This action is brought for infringement of letters patent No. 125,044, issued to James F. Guthrie, March 26, 1872, and by him assigned to the plaintiffs, for improvement in casting copper tubes. The specification says:

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

"Heretofore, for casting copper tubes, etc., and under letters patent No. 24,915, issued to Freeborn Adams, a rotary mould has been employed. Practice, however, has shown that the use of a rotary mould did not produce uniform or perfect castings; that its length and weight, and its revolution at a very high speed, prevented that accuracy of rotation which is essential for a perfect introduction of the molten copper. The purpose of this invention is to obviate the disadvantages existing in the use of the letters patent aforesaid; or, in other words, of a rotary mould, while securing all the advantages which a rotary mould possesses over a stationary one as employed previous to and since said letters patent to Freeborn Adams. The invention consists of an upright mould in combination with a chamber or vessel, into which the molten metal is poured, that has one, two, or more tubes for distributing the molten metal within the mould, and is arranged to be rotated; its axis of revolution and the axis of the mould being in the same vertical line and plane. By this combination, a conveyance and introduction of the molten metal to the mould is secured, without injury or disturbance to the core of the mould or the mould itself, and with the utmost accuracy and most uniform and perfect results, as practice and use has demonstrated."

The claims of the patent are as follows:

"(1) A mould-case in combination with a revolving distributing chamber or hopper for conducting the molten metal to the mould, substantially as and for the purpose described. (2) The revolving distributing hopper for conducting the molten metal to the mould, when provided with two or more distributing tubes, substantially as described, for the purpose specified."

The defendants, as we have seen in the preceding case between the same parties, use a rotary chamber or basin, in combination with a stationary mould. The basin used by them since 1872 is substantially like the one described in the Guthrie patent in controversy, except in the use of two or more distributing tubes. As stated in the specification, Guthrie's purpose was to improve upon the Adams patent by the use of a rotary hopper or basin instead of rotating the mould. Both devices, however, secure the same method of distribution of the metal in the mould, which was the great merit of Adams' invention. We have already decided in the previous case that the defendants use substantially the method of Adams as to distribution, and it follows, therefore, that they use substantially the same method of distribution as Guthrie. We think it clear, from the conclusions reached in the other case, that the defendants infringe the first claim of the Guthrie patent, which is for a mould-case in combination with a revolving distributing chamber for conducting the molten metal to the mould. The prior patents referred to in this case, as in the other, do not anticipate the Guthrie device, for the same reasons that they did not anticipate the Adams process.

The second claim is not infringed, because the defendants do not use two or more distributing tubes. It appears that Guthrie was employed by the defendant company for some years previous to June 17, 1872; and that, during this time, a machine containing four rotary hoppers was built under his supervision and direction. Under such circumstances, the defendant company may be said to have a license to use that particular machine. *McClurg v. Kingsland*, 1 How. 202;

*Wooster v. Sidenberg*, 2 Ban. & A. 91; *Black v. Hubbard*, 3 Ban. & A. 39; *Bloomer v. Millinger*, 1 Wall. 340; *Magoun v. New England Glass Co.*, 3 Ban. & A. 114.

Decree for complainants.

---

FRANKFORT WHISKY PROCESS CO. v. PEPPER and others.

(*Circuit Court, S. D. New York.* ———, 1885.)

PATENTS FOR INVENTIONS—SUIT FOR UNAUTHORIZED USE—PARTIES.

Where the former owner of a patent has disposed of all interest in the same, reserving the right to specified uses of the invention, he has no interest in the patent, and is not a necessary party plaintiff in an action against third parties for an unauthorized use of such invention.

WALLACE, J. The ground of demurrer assigned is that Allen, the former owner of the patent upon which the suit is founded, has not been joined as a party complainant. In the instrument conveying the patent to the complainant, Allen, the then owner, reserved the right to himself to use and to license others to use the process patented "to mash an aggregate of 4,000 bushels of grain in each and every 24 hours, and convert the same into distilled spirits," and also to license the proprietors of certain specified distilleries to use the patented process. The conveyance was a grant of the patent, with a reservation of a license to the grantor; and is in legal effect as though the grantor had made an unqualified transfer of the patent to the complainant, and had at the same time received from the complainant a license back. Allen is not a necessary party to a suit by the complainant against third persons to restrain infringement.

The demurrer is overruled, with costs.



## SHARON v. HILL.

*(Circuit Court, D. California. December 26, 1885.)***1. EQUITY PLEADING—CITIZENSHIP—PLEA IN ABATEMENT.**

Where defendant, in a suit in the circuit court, pleaded in abatement that plaintiff was not a citizen of Nevada, as claimed, but of California, and the plea, being set down for hearing, was overruled, without any evidence being taken, or defendant allowed a day to answer on the merits, this is a proper disposition of the case, and the same defense cannot be again set up.

**2. EVIDENCE—PRESUMPTION—FAILURE TO PRODUCE WRITING.**

Where a party willfully refuses to produce a writing which it is sought to annul as a forgery, it will be presumed that its production and examination would show its falsity.

**3. WITNESS—CONTRADICTION—IMPEACHMENT.**

Mere variance between the statements of two witnesses will not necessarily impeach or affect the credibility of either of them, as the contradiction may arise from mistake, or other cause consistent with their integrity.

**4. CITIZENSHIP—RESIDENCE—FOURTEENTH AMENDMENT.**

The fourteenth amendment does not make a resident in a state a citizen of such state, unless he intends, by residence therein, to become a citizen.

**5. ESTOPPEL—RES ADJUDICATA, WHAT IS.**

The parties to a suit in which a question has been determined cannot litigate the same question in another suit, whether instituted before or after the suit in which the matter was determined, or in the same or another court.

**6. SAME—JUDGMENT IN CALIFORNIA, WHEN FINAL.**

In California a judgment is not final, and an estoppel against the parties, pending an appeal to the supreme court.

**7. SAME—CONSENT TO REMAND OR ASSIGN CASE.**

A consent to remand a case, or assign it for trial before a certain judge, will not prevent the party so consenting from litigating any of the questions involved in another suit.

**8. SAME—SUBSEQUENT SUIT IN STATE COURT.**

A suit in a circuit court of the United States will not be stayed until another suit, subsequently brought between the parties, involving some of the same questions, shall have been determined.

**9. HUSBAND AND WIFE—MARRIAGE—EVIDENCE—FRAUD—FORGED DECLARATION AND LETTERS—CONDUCT OF WOMAN.**

Evidence examined, and held to show letters and alleged secret declaration of marriage to have been forged, and decree of annulment granted.

**In Equity.**

*W. H. L. Barnes, William M. Stewart, Oliver P. Evans, and H. I. Kowalsky, for plaintiff.*

*George W. Tyler, W. B. Tyler, and David S. Terry, for defendant.*

Before SAWYER and DEADY, JJ.

DEADY, J. This suit was commenced on October 3, 1883, to have a certain alleged declaration of marriage between the plaintiff and defendant declared to be false and fraudulent, and delivered up to be canceled and annulled, and to enjoin the defendant from the use thereof. It is alleged in the bill that the plaintiff is a citizen of Nevada, and the defendant a citizen of California; that the plaintiff has never been the husband of any woman but one, who died in 1875,

leaving three children, the issue of said marriage, and that he is possessed of a large fortune, and has a large business and social connection; that the defendant is an unmarried woman, of about 30 years of age, who has resided in the city of San Francisco for some years, and within two months past has publicly claimed and pretended to be the wife of the plaintiff, to whom she alleges she was duly married on August 25, 1880, in San Francisco, by means of a joint declaration of marriage, made in conformity to section 75 of the Civil Code of California; that said claim and pretense are wholly false and untrue, and are made by the defendant for the purpose of obtaining credit and support at the expense of the plaintiff, and to obtain money from him, or, in case of his death, from his heirs, to quiet the same; that the defendant now claims to have said declaration in her possession, but the plaintiff never saw or heard of it until within a month past, and is informed that it is substantially as herein set forth; and that the same is false and forged, and null and void, and ought, as against the plaintiff, to be so declared, and delivered up to be canceled and annulled. On December 3, 1883, the defendant demurred to the bill for want of equity, and on March 3, 1884, the court (SAWYER and SABIN, JJ.) gave judgment overruling the demurrer, on the ground that the instrument, if false or forged, might be hereafter used to maintain a false claim to an interest in the plaintiff's property at a distance of time when the proof of its fraudulent character was unattainable. 10 Sawy. 48, and 20 Fed. Rep. 1.

On April 24, 1884, the defendant pleaded in abatement of the suit: (1) Another suit pending in the superior court of the state, between the same parties, commenced on November 1, 1883, by the defendant for a divorce from a marriage with the plaintiff, by means of said declaration, and the subsequent cohabitation of the parties thereto, until November, 1881, on the ground of adultery and desertion by the plaintiff, which suit was, on November 20, 1883, removed to this court on the petition of the plaintiff, and afterwards, on December 31, 1883, in pursuance of the stipulation of the parties, was remanded to said state court, and that said suit was then on trial therein on the question of whether the plaintiff and defendant are husband and wife, by reason of said declaration and cohabitation; and (2) the court has no jurisdiction of the matters set forth in the bill herein, because the plaintiff is a resident and citizen of California. To this the plaintiff, on May 5, 1884, replied that he ought not to be "barred" from the relief prayed for, by reason of the matters set forth in the plea, and that it is not true that he is a citizen of California. On October 16, 1884, the three months allowed by equity rule 69 for taking evidence on the issue made on the plea having expired, the cause was regularly brought on for hearing on the bill, plea, and replication, when the court (SAWYER, J.) gave judgment for the plaintiff, overruling the plea, with leave to the defendant to answer to the merits within 30 days. The court, after calling attention to the fact

that the plea was bad for duplicity, said, in substance, admitting the allegations concerning the pendency of the suit in the state court, it did not appear that they were for the same purpose or relief; and, if they were, the plea was so far insufficient, because the two suits were pending in courts of different jurisdictions; and, there being no proof in support of any allegation in the plea, it was overruled. 10 Sawy. 394, and 22 Fed. Rep. 28.

On December 30, 1884, the defendant answered the bill, denying that she is an unmarried woman; that the plaintiff is a citizen of Nevada, and averring that he is a citizen of California; that plaintiff never was the husband of any person but his deceased wife, and that he was unmarried at the filing of the bill; that defendant's claim to be the wife of the plaintiff is false, or made for any purpose but to obtain recognition and support as his wife, and admitting that she had made such claim for the past 15 months; that defendant was never the wife of the plaintiff, or that said declaration is null and void or false and forged; and avers that the parties were married on August 25, 1880, and that said declaration is valid and genuine. The answer also contains what is styled therein "a further and separate answer and defense," to the effect that "the plaintiff ought not to be permitted to prosecute this suit," because on August 25, 1880, the parties, by agreement, became husband and wife, and "assumed towards each other that relation," but said marriage not being solemnized as provided in section 70 of the Civil Code of California, the plaintiff and defendant on said day jointly made a declaration of marriage, as set forth in the bill, and thereafter, until November, 1881, cohabited together as husband and wife, when the plaintiff refused to recognize said marriage, and deserted the defendant; that on November 1, 1883, the defendant, as Sarah Althea Sharon, commenced an action against the plaintiff, in the superior court of San Francisco, for divorce, and that "the allegations of marriage in the complaint" therein "were principally founded upon said declaration of marriage." The answer then sets forth *in extenso* the removal of such action to this court, and the remanding of the same, in pursuance of the stipulation as aforesaid, and then proceeds: That by the stipulation of the parties such action was assigned to department 2 of said superior court for trial before a judge thereof, without a jury, and the same was so tried between March 10 and September 17, 1884; that thereafter, on December 24, 1884, said judge found and decided (1) that the parties to such action were, and had been since August 25, 1880, husband and wife; (2) that said declaration of marriage is "true and genuine," and was signed by the defendant therein, and that said parties had cohabited together as husband and wife; and (3) that the defendant had deserted the plaintiff, and the latter was entitled to a divorce and a division of the common property. Wherefore, it is averred that the question of the "genuineness" of said declaration, which is now sought to be tried in this suit, is the same question that

was adjudged and determined in said superior court, and has therefore "become *res adjudicata* as between" the parties hereto.

On January 2, 1885, the general replication was filed to this answer, and on February 5th the defendant filed a supplemental answer, alleging that since the filing of the former answer said superior court had filed its findings and decree, wherein it is adjudged that said declaration is a genuine contract of marriage between the parties hereto, and said parties thereby became husband and wife. Subsequently the defendant in *Sharon v. Sharon* duly took an appeal from the judgment therein, and gave notice of a motion for a new trial, both of which proceedings are still pending and undetermined.

The evidence was taken orally before an examiner of the court during the period between February 5 and August 11, 1885, and covers 1,731 pages of legal-cap, written with a type-writer. Besides this, there are a large number of exhibits, consisting of enlarged drawings or tracings of the disputed writings, and particular parts and peculiarities of them, and of the admitted writings of the parties, together with a large number of bank-checks containing the plaintiff's signature; and photographic copies of the declaration; five letters alleged to have been written by the plaintiff to the defendant, and known as the "Dear Wife" letters; a letter from the plaintiff to S. F. Thorn, dated October 16, 1880; four letters written by the defendant to the plaintiff during the years 1881 and 1882; and a letter to the plaintiff written in 1882, and signed "Miss Brackett," besides tracings and other writings of third persons.

The plaintiff having testified on the first day of the examination that the declaration was false and forged, an effort was then made by the plaintiff to have the defendant produce the same before the examiner for inspection by the expert witnesses of the plaintiff, which she evaded doing until February 25th, when she was compelled to do so by the order of the court; and on March 16th, in pursuance of a like order, she produced three of the five "Dear Wife" letters, known as Exhibits 11, 13, and 37, which declaration and letters were examined by Dr. Piper for the plaintiff, and drawings made of the same with the aid of a microscope, from time to time thereafter, in the presence of the examiner, until March 19th, when the defendant, in disregard of the order of the court, and on contumacious, frivolous, and contradictory pretexts, refused to allow a particle of ink to be taken from either of them for examination by the expert under the microscope, so as to ascertain the character and kind of the same, and particularly that used in writing the declaration, which the defendant alleges was written in the plaintiff's office; or to produce said declaration, or any of said five letters, on the hearing in court, for examination by the judges, except the ones known as Exhibits 16 and 37, which were submitted to the court near the close of the hearing for the purpose of determining a comparatively immaterial question relative to the testimony of one of the expert witnesses of the plain-

tiff. Nor did she produce any of such writings before the examiner after March 19th, although their production was thereafter repeatedly and specially demanded by the plaintiff for the inspection of others of his expert witnesses, and particularly to enable counsel effectually to cross-examine the witnesses of the defendant who swore to their genuineness from a private inspection of them, made out of court while they were in her exclusive possession and control. See 10 Sawy. 635, 666, and 23 Fed. Rep. 353. In considering the question of the genuineness of these writings, weight must be given to the fact of the defendant's refusal to submit them to the tests and criticism which the law properly allows, as a means of ascertaining the truth thereabout. 2 Whart. Ev. §§ 1266, 1267. The defendant alleges in her answer that this declaration is genuine, and in her testimony she swears that the letters are of the same character, while on the hearing of the cause she refuses to submit them to the criticism of counsel and the inspection of the court. This singular conduct can only be interpreted as an admission that such inspection would tend to prove their falsity.

Notwithstanding the plea in abatement was overruled, the defendant in her answer formally denies that the plaintiff is a citizen of Nevada, and repeats the allegation that he is a citizen of California; and on the examination took testimony in support thereof, including the cross-examination of the plaintiff; and on the hearing, counsel insisted on again raising the question, and having it determined *de novo*, on the pleadings and testimony now before the court. But the court declined to reconsider the question or to hear argument on the subject, for the following reasons: (1) In the due and orderly course of proceeding in the case, the question was made and disposed of on the plea to the jurisdiction; (2) no attempt was made to obtain a rehearing on the plea, or to take evidence in support of it, but the action of the court in overruling it was acquiesced in, and the case proceeded with on the theory that, for the purposes of this suit, at least in this court, the question of the citizenship of the plaintiff was settled; and (3) because, in my judgment, the ruling and action of the circuit judge in the premises was in all respects legal and right.

But on the argument counsel also called attention to the evidence taken by the defendant on this point, and insisted that the same was contradictory of the plaintiff's testimony, and so far affected his credibility unfavorably. A witness may be discredited by showing that on a former occasion he made a statement inconsistent with his testimony in the case on trial, provided such statement is material. 1 Whart. Ev. § 557. But the contradiction by one witness of the statement of another does not necessarily impeach or affect the credibility of either. The contradiction may arise from mistake, ignorance, want of memory, difference of opinion, or other cause consistent with the integrity of both witnesses. So, in this case, admitting that there are conflicting or contradictory statements in the evidence on the sub-

ject of the plaintiff's citizenship, it does not follow that his testimony is untrue, or that he is at all discredited thereby. Of course, if the court finds that any witness has willfully or even recklessly sworn to an untruth, it will apply the maxim, *falsus in uno, falsus in omnibus*, and treat him accordingly; but the mere fact that the witness is contradicted, does not impeach or discredit him, and the effect may be to discredit the contradicting witness. But there is nothing in the evidence taken by the defendant that contradicts or impugns the statement of the plaintiff that he is and has been a citizen of the state of Nevada since 1864.

"Citizenship" and "residence," as has often been declared by the courts, are not convertible terms. *Parker v. Overman*, 18 How. 141; *Robertson v. Cease*, 97 U. S. 648; *Grace v. American Cent. Ins. Co.*, 109 U. S. 283; S. C. 3 Sup. Ct. Rep. 207; *Prentiss v. Barton*, 1 Brock. 389. Citizenship is a *status* or condition, and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become such citizen by mere residence. The residence and the intent must co-exist and correspond; and though, under ordinary circumstances, the former may be sufficient evidence of the latter, it is not conclusive, and the contrary may always be shown; and when the question of citizenship turns on the intention with which a person has resided in a particular state, his own testimony, under ordinary circumstances, is entitled to great weight on the point.

In this case, the plaintiff, admitting his residence in San Francisco for the greater portion of the time for some years before the commencement of this suit, swears that he never intended to become a citizen of California or cease to be a citizen of Nevada. It is admitted that in 1864 he removed from California to Nevada, and became a citizen thereof, and that in 1873 his family, after a short sojourn in Europe, took up their residence in San Francisco; that, in 1875, he was elected United States senator from Nevada, and his wife died, since when he has lived at the Palace, in this city, the greater portion of the time; and that he has large business interests and property in both California and Nevada. But it also appears that in 1880 he was seeking a re-election to the senate from the state of Nevada, and that he has never registered, voted, sought, or held any office, or claimed or exercised any political right or privilege, in this state since his removal to Nevada in 1864. In all these respects his conduct squares with and strongly corroborates his testimony as to the intention with which he had resided in this state. Nor do the statements made by him as a witness in *Boland v. Sharon* show anything to the contrary of this. That was a suit in a justice's court in this city, commenced on June 22, 1877, on an open account for brokerage alleged to have been earned by the assignor of Boland, on September 9, 1873. To avoid the defense of the lapse of time there was an allegation in the complaint that Sharon was absent from the

state for more than two years between these dates. On the trial Sharon testified in effect that he was not absent from the state for that time during that period, and judgment was given in his favor. And if Sharon had been a citizen of New York, or an English subject, commorant in San Francisco for the same period, he might truthfully have made the same statement. His citizenship was not involved in the question, and the only matter in dispute was the simple fact whether he was personally present in the state any two years between September 9, 1873 and June 22, 1877, so that he could have been personally served with process therein.

The evidence only proves that the plaintiff was generally an inhabitant of this city for a few years before the commencement of this suit. But when we consider that the plaintiff swears positively that he never intended to become a citizen of this state, and that no act of his while here is inconsistent with such purpose; and when we consider further that Nevada is and has been a favorite mining ground for California capitalists and operators, and that San Francisco is the business and social center of the one state as much as the other, —the mere fact of the plaintiff's bodily presence here, for one or ten years, under the circumstances, is of very little moment in determining his citizenship. Many citizens of Connecticut and New Jersey doubtless do business in New York, the great commercial and social center of that region, and practically reside there, but without becoming citizens of the state, for the reason that they are not there with any such purpose or intention.

Nor, in my judgment, is this well-established rule materially modified by section 1 of the fourteenth amendment, the first clause of which declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Prior to the adoption of this amendment, strictly speaking, there were no citizens of the United States, but only of some one of them. Congress had the power "to establish an uniform rule of naturalization," but not the power to make a naturalized alien a citizen of any state. But the states generally provided that such persons might, on sufficient residence therein, become citizens thereof, and then the courts held, *ab convenienti*, rather than otherwise, that they became *ipso facto* citizens of the United States. Story, Cont. § 1693; *Prentiss v. Barton*, 1 Brock. 391. But the amendment declares the law positively on the subject, and reverses this order of procedure, by making citizenship of a state consequent on citizenship of the United States; for, having declared what persons are citizens of the United States, it does not stop there, and leave it in the power of a state to exclude any such person who may reside therein from its citizenship, but adds, "and such persons shall also be citizens of the state wherein they reside." But, certainly, it was not the intention of the amendment to make any citizen of the United States a citizen of any par-

ticular state against his will, in which the exigencies of his business, his social relations or obligations, or other cause, might require his presence for a greater or less length of time, without any intention on his part to become such citizen.

The better opinion seems to be that a citizen of the United States is, under the amendment, *prima facie* a citizen of the state wherein he resides, and cannot arbitrarily be excluded therefrom by such state, but that he does not become a citizen of the state against his will, and contrary to his purpose and intention to retain an already acquired citizenship elsewhere. The amendment is a restraint on the power of the state, but not on the right of the person to choose and maintain his citizenship or domicile; but it protects him in the exercise of that right by making him a citizen of that state in which he may choose to reside with such intention. In *Robertson v. Cease*, 97 U. S. 648, the court held that, for the purpose of giving jurisdiction to the circuit court, an allegation that a party is a resident of a particular state is not equivalent to an allegation that he is a citizen thereof, for the reason, as suggested by Mr. Justice HARLAN, that, even under the amendment, mere residence in a state does not necessarily or conclusively prove one to be a citizen thereof. And if an allegation of residence in a state is not necessarily, even under the amendment, the equivalent of an allegation of citizenship, then the mere fact of residence in a state is not necessarily the equivalent of citizenship.

One other question remains to be disposed of before passing to the consideration of the genuineness of the alleged declaration of marriage, and that is the effect of the finding and adjudication of the superior court in *Sharon v. Sharon*. At the first blush I was of the impression that this suit having been first commenced, neither the right to maintain it, nor the determination of any question involved therein, could be affected by any finding or judgment in the case of *Sharon v. Sharon*. But on further reflection and examination of the authorities I am satisfied that the law is otherwise as to the effect of the finding or judgment. It matters not in which suit the subject of the controversy or any question involved therein is first determined, the result may be set up as a bar or estoppel, as the case may be, against the further litigation of the same matter in the other. The maxim, *interest reipublicæ ut sit finis litium*, equally applies. See *Bellinger v. Craigie*, 31 Barb. 534; *Gates v. Preston*, 41 N. Y. 113; *Casebeer v. Mowry*, 55 Pa. St. 419.

A judgment on the merits in an action on a claim or demand is a bar to another action thereon between the same parties or their privies, and concludes them as to all matters which appear on the face of the judgment to have been determined, or which were actually and necessarily included therein, or necessary thereto. Code Civ. Proc. § 1911; but where the actions are not on the same claim or demand, a judgment in the one is only an estoppel in the other as to a matter in-



volved therein and actually found and determined thereby. *Outram v. Morewood*, 3 East, 346; *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, Id. 427.

This suit and the action of *Sharon v. Sharon* are not brought on the same claim or demand. The subject-matter and the relief sought are not identical. This suit is brought to cancel and annul an alleged false and forged writing, and enjoin the use of it by the defendant to the prejudice and injury of the plaintiff, while the other is brought to establish the validity of said writing as a declaration of marriage, as well as the marriage itself, and also to procure a dissolution thereof, and for a division of the common property, and for alimony. But the validity and genuineness of this declaration of marriage were directly involved in the action of *Sharon v. Sharon*, and determined in favor of the same by the finding and judgment therein. The plaintiff is therefore estopped to show the contrary in this suit, unless the effect of that judgment, as an estoppel in this case, has been obviated by the appeal therefrom to the supreme court, and the pending motion for a new trial.

There is some confusion and contradiction in the language and ruling of the authorities on this point. But this arises largely from the fact that the difference in the original mode and effect of reviewing a judgment in an action at law, and the decree of a court proceeding according to the civil law, as a court of chancery or admiralty, is often, latterly, overlooked. A judgment in an action at law could only be reversed and annulled for error appearing on its face. For this purpose a writ of error issued out of the court above, to bring up the record for examination. This was considered a new action to annul and set aside the judgment of the court below; and if the writ was seasonably sued out and bail put into the action, it was a *supersedeas*, so far as to prevent an execution from issuing on the judgment, pending the writ of error, but left it otherwise in full force between the parties, either as a ground of action, a bar, or an estoppel. 2 Bac. Abr. 87; 3 Black, 406; *Railway Co. v. Twombly*, 100 U. S. 81. But in the equity and admiralty courts the remedy for an erroneous decree is an appeal, which removes the whole case into the court above, for trial *de novo*. There is no decree left in the lower court, and, pending the hearing on appeal, there is no decree in the case, and there can be no estoppel by reason thereof. The tendency during the past half century has been to assimilate proceedings in equity and law cases, and in the states where the modern code prevails, the proceeding by which a judgment is reviewed in the appellate court is generally known as an appeal, although in effect it is more like a writ of error than an appeal.

In this condition of things, the courts of some of the states have held that the effect of an appeal in any case is to suspend the judgment appealed from for all purposes; and that, pending the appeal, or during the time in which one may be taken, the judgment is neither

a bar nor an estoppel. In others, the courts have regarded the appeal, in cases where the power of the appellate court is confined to the affirmation, modification, or reversal of the judgment, according to the facts found or the things done, as appears from the record, as a mere proceeding for the correction of errors, and have therefore held that the judgment of the court below is in the mean time in full force as a bar or estoppel. Such was the ruling in *Bank of North America v. Wheeler*, 28 Conn. 433, in which the court said:

"If the appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors which may have intervened in the trial of the case in the court below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and that court has no other powers or duties than to affirm, reverse, or modify that judgment, or remit the case to the inferior tribunal that it may conform its judgment to that of the appellate tribunal, then such appeal \* \* \* does not vacate or suspend the judgment appealed from; and the removal of the case to the appellate court would no more bar an action on the judgment than the pendency of a writ of error at common law, when that was the proper mode of correcting errors which may have occurred in the inferior tribunal. That such an action would not be bound by the pendency of such a proceeding is well settled. The judgment below is only voidable."

This case is cited and followed in *Rogers v. Hatch*, 8 Nev. 35, and *Cain v. Williams*, 16 Nev. 426. But the law of California on this subject is the law by which this court must be governed. By the act of 1790, (1 St. 122; Rev. St. § 905,) congress provided that "the records and judicial proceedings" of the state courts "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The judgment in *Sharon v. Sharon* can have no other effect in this court, as an estoppel, than it would have in a court of the state under like circumstances. *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 234; *Thompson v. Whitman*, 18 Wall. 457; *Bigelow*, Estop. 29, note 1. By section 946 of the Code of Civil Procedure, it is provided that an appeal "stays all further proceedings in the court below on the judgment \* \* \* appealed from." This, in effect, makes the appeal, like a writ of error, a *supersedeas*, and prevents the enforcement of the judgment by execution, pending the appeal, but nothing more. But section 1049 of the Code goes further, and provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until after the time for an appeal has passed, unless the judgment is sooner satisfied." The effect of this provision appears to be that the judgment in the court below is only a step in the proceeding to a final judgment in the appellate court in case of an appeal, and otherwise to hold it in suspense as a ground of action or defense in another suit, until the time for taking an appeal has passed.

But these provisions of the Code are merely the codification of the

law as declared by the supreme court of the state under the old practice act, according to which an appeal from a judgment not only stays its execution, but suspends its operation for all purposes. See *Knowles v. Inches*, 12 Cal. 215; *Woodbury v. Bowman*, 13 Cal. 634; *McGarrahan v. Maxwell*, 28 Cal. 91; *Freem. Judgm.* § 328. And in *Murray v. Green*, 64 Cal. 369, this rule has been followed since the enactment of the Code. In the leading case of *Woodbury v. Bowman*, which is cited and followed in the latest one, (*Murray v. Green*), the opinion of the court was delivered by the senior counsel for the defendant. In speaking of the rejection of a judgment roll in a case then pending on appeal, when offered in evidence in the case under consideration, he says: "We think it was properly rejected. The appeal having suspended the operation of the judgment for all purposes, it was not evidence in the question at issue, even between the parties to it." It follows that the plaintiff is not estopped by the finding and judgment of the superior court in *Sharon v. Sharon*, to allege and prove in this case that the declaration of marriage is false and forged.

The junior counsel for the defendant made the point on the argument that the plaintiff was in some way estopped to try this question in this case or in this court, because, forsooth, he had consented that the case of *Sharon v. Sharon* might be remanded to the superior court, and also that it might be assigned to a particular department thereof, and tried by a particular judge therein, without jury. But how such a simple matter could have such a serious effect is not apparent, and counsel does not make it so; and, certainly, a mere consent to a matter of procedure in a case cannot have the effect to bind the party thereto never to litigate any question involved therein in any other case or court. As a matter of public policy, founded on a sense of justice and convenience, a party is bound by the result of litigation to which he is a party, and not because any of the intermediate steps in the proceeding, as the number of the jury or the judge before whom it was tried, were taken with his consent; and, indeed, a judgment by consent is no more binding on the defendant than one regularly obtained against his will. Consent to the entry of a judgment, or any step leading thereto, gives no peculiar or additional force or effect to the result. It is still a judgment, and nothing more.

This disposes of all the collateral and preliminary questions made on the argument by counsel for the defendant, except an objection to sundry portions of the plaintiff's evidence for irrelevancy, which needs no special notice.

Is the alleged declaration of marriage a genuine instrument, or a false and forged one? is the principal question in this case; and I proceed to dispose of it as briefly as possible. Closely related to this, however, is the question of the genuineness of the five "Dear Wife" letters. Originally, they all came from the possession of the defendant, and if either the declaration or the letters appear genuine it is a

convincing circumstance in favor of the other, and *vice versa*. The evidence on this point includes the testimony of experts in handwriting, persons more or less familiar with the plaintiff's writing, witnesses to the existence of the declaration and letters as far back as the fall of 1881, the acts and declarations of the parties during the alleged existence of these documents, and their testimony given in this case.

Many of the witnesses testified in the case of *Sharon v. Sharon*, and some of them were cross-examined at great length concerning the testimony they gave there. Some of the collateral matters that were prominent topics in that case were omitted in this; for instance, the grave-yard charm, the visits to fortune tellers to get devices to influence the affections of the plaintiff to the defendant, and practices resorted to by her to that end. Nor was there any evidence in the case tending to show that the plaintiff ever introduced the defendant to any member of his family, or that she was present at the reception given at Belmont by the plaintiff to his daughter Flora, on the occasion of her marriage with Sir Thomas Hesketh; nor did the plaintiff testify as to the nature of his relation with the defendant, further than to deny the genuineness of the declaration, or that she was ever his wife, or ever recognized as such in any way or at any time.

I have carefully considered all the evidence, but it is unnecessary, if not impossible, to speak of it in detail. And, *first*, the undisputed and undoubted facts of the case are briefly these: The plaintiff is and has been for years a prominent and well-known person on this coast. He was born in 1821, and came to California in 1849, and has been in business in this state and Nevada ever since, where he has acquired a fortune that he modestly estimates at \$5,000,000. Early in the 50's he married Miss Mary Ann Malloy, in this city. She died in 1875, leaving a son and two daughters, one of whom has since died, leaving three children, and the other is married in England, and the mother of two children. The son is living, and 29 years of age. Since the death of his wife the plaintiff has lived ostensibly as a widower, in rooms at the Palace, of which he is the proprietor. He is considered a shrewd, active, intelligent, and courageous man of the world, with a liking for public affairs, and between 1875 and 1881 was United States senator from Nevada. In his composition there appears to be a vein of sentiment and love of pleasure that has led him into illicit relations with the other sex, and given him the reputation of a libertine.

The defendant appears to be an attractive woman of about 32 years of age, but she is not certain as to the year of her birth. She was born in Missouri, and lost her parents, as I infer, when she was quite young. She went to school at a convent for some time, but she cannot state how long. She came to this state in 1871, where she has relatives, with her brother, and lived with them for eighteen months or two years. From 1873 to 1875 she lived at the Grand Hotel with

her brother, after which she lived some time with a relative. Then she kept house for a time with her brother, when she returned to the Grand, where she remained until the opening of the Baldwin, in 1877, when she removed thither. In the spring of 1880 she went to live at the Galindo Hotel, in Oakland, and returned to the Baldwin after the burning of the Galindo, early in September of the same year, but removed to the Grand about the last of the same month, where she remained until December 6, 1881, when she was expelled therefrom by order of the plaintiff. The Grand has been owned by the plaintiff since prior to 1880, and is connected with the Palace by a bridge across the street which separates them.

Not much light is thrown by the evidence upon the defendant's occupation or associations during these 10 years. She appears to have received some thousands of dollars from her guardian in Missouri, which I infer came from her mother's estate. Between 1878 and 1880 she was engaged in stock speculations. In 1878-79 her account at the Bank of California showed cash deposits to her credit of over \$16,000, of which sum only \$11 was left to her credit in February, 1880, and she owed a bill at the Baldwin of \$339. During the latter part of this 10 years she had a serious love affair with a prominent lawyer of San Francisco, which culminated on May 10, 1880, in an attempt to commit suicide in his office by taking poison, from the fatal effect of which she was only saved by the prompt use of the stomach-pump.

Some time in 1880, and after May 10th, she made the acquaintance of the plaintiff in some casual way on the street or in the Bank of California, as a large stock dealer, which resulted in his calling on her at the Baldwin, and she calling at his office over the bank, though it is not at all certain, even from the testimony of the defendant, which called first. On September 25, 1880, the plaintiff sent her a note from the Palace to the Baldwin asking for a meeting with her elsewhere than at the latter place. So far as appears, this is the first written communication that ever passed between the parties; and she swears that the plaintiff sent her two other notes of like import on the same day. The following is a copy of the only one produced:

[Exhibit 21.]

"SAN FRANCISCO, September 25, 1880.

"*My Dear Miss Hill:* Can you meet me this evening, say about five o'clock, in the parlors of the Grand Hotel? Something I want to tell you of interest to yourself. Will not do to meet you at the Baldwin; so, if you cannot see me at the Grand, name place and hour.

"Very truly,

WM. SHARON."

On September 29th the defendant, at the request of the plaintiff, went to the Grand to live, where she was known as Miss Hill, the plaintiff paying her a stipend of about \$500 a month, and allowing her to visit his rooms in the Palace privately, and occasionally inviting her there to take a meal with him. On December 5, 1880, the

defendant wrote and the plaintiff signed and delivered to her an agreement, of which the following is a copy: "100 shares of Belcher, held for Miss Hill, at 200 dollars a share, to be paid on delivery. W. SHARON. December 5, 1880." Some time in the fall of 1881 the plaintiff accused the defendant of purloining some of his Belcher mine papers, and revealing his business secrets and private affairs to other persons, which she denied at the time, but now admits that after she left the Grand she found the papers in one of her trunks, and that she has not returned them. For this and other reasons, the plaintiff appears to have been desirous of terminating his relations with the defendant; and accordingly, on November 7th, he effected an arrangement with her by which, in consideration of a receipt in full of all demands, and a promise not to trouble him any more, he gave her the sum of \$7,500, as follows: Cash, \$3,000; by note payable August 1, 1882, \$1,500; and by an agreement to pay her \$250 a month during the year 1883.

On November 19th, the business manager of the Grand Hotel, by direction of the plaintiff, sent the defendant the following note:

"Miss S. A. Hill—DEAR MADAM: As we wish to otherwise occupy room 208 on December 1st, prox., you will please select another residence, and give up possession on that date, and much oblige

"Yours,

S. F. THORN."

The defendant did not vacate the room as required, and on December 5th the door was taken off the hinges; but at her request she was permitted to stay until the next morning, when, still not making any movement to leave, the carpets were taken up, and she was informed by the servants that if she did not go they had orders to put her out, and she left on the evening of December 6th. Between the time of receiving the notice to quit and her final departure from the hotel the defendant wrote three letters to the plaintiff, of which the following are copies:

"Mr. Sharon: I received a letter from Mr. Thorn in regard to my room. Of course I understand it is written by your orders, for no human being can *say aught of me* except with regard to yourself. Now, Mr. Sharon, you are wronging me; so help me God, you are wronging me. I am no more guilty of what you have accused me than some one who never saw you; and would you, who wished me to come to this house, whom I have been up with nights, and waited on and cared for, and would have done anything to help you, be the one to wrong and injure me?—a man whom the people have placed enough confidence in his honor to put him in the United States senate, to *stoop to injure a girl, and one whom he has professed to love!*"

"My Dear Mr. Sharon: I cannot see how you can have any one treat me so,—I, who have always been so good and kind to you. The carpet is all taken up in my hall. The door is taken off and away, and it does seem to me terrible that it is you who would have it done. I met Mr. Thorn in the hall as I started to come over to see you, and asked him if he had ordered such a thing done, and he said that I must move out; that it was your wish. I told him that I had written you a note, when I received yours, and told you if you wished me to go, to send me word, for it was not *convenient* to get the

place I wanted until some time this month. He said that you had told him to see that I went, so I said no more, but came over to see you. Oh, senator, dear senator, don't treat me so! Whilst every one else is so happy for Christmas, don't try to make mine so miserable. Remember this time last year. You have always been so good; you don't act so. Now let me see you and talk to you. Let me come in after Ki has gone, if you wish, and be to me the same senator again. Don't be cross to me; please don't. Or may I see you, if only for a few minutes? Be reasonable with me, and don't be unjust. You know you are all I have in the world, and a year ago you asked me to come to the Grand. Don't do things now that will make *talk*. You know you can find no fault with me. May I see you for a few minutes? and let us talk reasonably about all this. I know you will. I know it is not in your nature to be so hard to one that has been so much to you, and don't be unjust. Say I may see you."

"*My Dear Mr. Sharon:* I have written you two letters, and received no reply, excepting to hear that they have been read and commented upon by others than yourself. I also heard you said you were told that I said I could and would give you trouble. Be too much of a man to listen to such talk, or allow it to give you one moment's thought. I have never said such a thing, nor have I had such a thought. If no woman ever makes you any trouble until I do you will go down to your grave without the slightest care. *No, Mr. Sharon, you have been kind to me. I have said I hoped my God would forsake me when I ceased to show my gratitude.* I repeat it. I would not harm one hair of your dear old head, or have you turn one restless night upon your pillow through any act of mine. If you are laboring under a mistake, and not bringing the accusation for the purpose of quarreling with me, the time will come when you will find out how you have wronged me; and I believe you too much of a man at heart not to send for me and acknowledge it to me. But in your anger you are going to the extreme; I mean by calling Thorn, or any of your relatives, or outsiders, and letting them know your anger. It simply gives them an opportunity of saying ill-natured things of me, which are unnecessary. Mr. Sharon, I have never wronged you by word or act; and were I to stay in this house for a thousand years I would never go near your door again until you felt willing to say to me you knew you had spoken unjustly to me. You once said to me there was no woman who could look you in the face and say: 'William Sharon, you have wronged me.' If that be the case, don't let me be the first to utter the cry. I had hoped to always have your *friendship* and best will throughout life, and always have your good advice to guide me, and this unexpected outburst and uncalled for action was undeserved. If you would only look at how absurd and how ridiculous the whole thing is, you surely would act with more wisdom. Why should I do such a thing? What have I to gain by doing so? Pray give me credit for some little sense. I valued your *friendship* more than all the world. Have I not given up everything and everybody for it? One million dollars would not have tempted me to have risked its loss. I feel humiliated to death that Thorn, or any one, should have it to say I was ordered out of the house. I have a world of pride, and I ask you to at least show me the respect to let Thorn have nothing more to do or say in the affair. I have always been kind to you, and tried to do whatever I could to please you; and I hope, at least, in your unjust anger you will let us *apparently part friends*; and don't do or say anything that could create or make any *gossip*. Think how you would like one of your daughters treated so. If you have any orders to give, or wish to, make them known in any other way than through your servants or through Thorn. Don't fight me. I have no desire or wish to in any way be unkind to you. I have said nothing to any one about the letter I have received, nor do I even wish to speak to Thorn on the

subject. You have placed me in a strange position, senator, and all the pride in me rebels against speaking upon the subject.

"As ever,

A."

To these letters the plaintiff vouchsafed no answer.

During the defendant's residence in the Grand the plaintiff was often absent from the city, and in the early part of 1881 was in Washington city some months; and it was not generally known or understood among the servants and guests of the hotel that she frequented the plaintiff's rooms, or that she remained there at night. The plaintiff admits that in the fall of 1881 she secreted herself in the plaintiff's rooms and witnessed him and a woman undress and go to bed together, and that she related the adventure to the seamstress of the hotel and others, with laughter, as something very funny. When the defendant left the Grand she remained in San Francisco, going first to the house of a negro woman, on Mary street, Martha Wilson, and afterwards keeping house, and then boarding at several places. The plaintiff never visited the defendant after she left the hotel, but in the summer of 1882 she appears to have visited him at the Palace; and in August of that year she wrote him a letter, of which the following is a copy:

"*My Dear Senator:* Won't you try and find out what springs those were you were trying to think of to-day, that you said Mr. Main went to, and let me know to-morrow when I see you? And don't I wish you would make up your mind and go down to them with Nellie and I, wherever they be, on Friday or Saturday. We all could have such nice times out hunting and walking or driving these lovely days, in the country. The jaunt or little recreation would do you worlds of good, and *us girls* would take the best of care of you, and mind you in everything. I wish we were with you this evening, or you were out here. I am crazy to see Nell try and swallow an *egg in champagne*. I have not told her of the feat I accomplished in that line, but I am just waiting in hopes of seeing her some day go through the performance. As I told you to-day, I am out to Nellie's mother's for a few days, 824 Ellis street. What a lovely evening this is, and how I wish you would surprise us two *little lone birds* by coming out and taking us for a moonlight drive. But gracious me, it's too nice to think of; but I really wish you would. 'Twould do you good to get out of that stupid old hotel for a little while, and we'd do our best to make you forget all your business cares and go home feeling happy.

A."

Early in 1883 she went to the Palace to visit the plaintiff, taking with her Nellie Brackett, the "Nellie" of the foregoing letter, a young girl whom she had had about her since the summer of 1882 as a sort of dependent companion; but she was expelled therefrom by his order. Soon after, Nellie Brackett wrote and sent a letter to the plaintiff, which she swears she wrote at the defendant's dictation; but the latter says Nellie wrote it "out of her own head," and then told her of it. The following is a copy of the letter:

"*Old Sharon:* When I first met you I felt quite honored to think I had on my list of acquaintances a United States senator, but to-day I feel it a double disgrace to know you. If you are a specimen of the men that are honored by



the title of rulers of our country, then I must say that I pity America; for a bigger coward or upstart of a gentleman never existed, in my opinion, since last Thursday night. I was present with the lady who called on you; and to think of what a coward you must be! Your own conscience would not allow you to see her and politely excuse yourself, but you must send one of your Irish hirelings to do your dirty work. I hope God will punish you with the deepest kind of sorrow, and make your old heart ache and your old head bend. I am one not to wish evil to people generally, but with all my heart I wish it to you. You did her a mean, dirty trick, and tried in every way to disgrace her,—a motherless, fatherless girl,—because you knew she leaned on you, and was alone in the world; and a few weeks after God took from you your much loved daughter. Be careful that, after this disgraceful outrage of Thursday night upon her, God does not again bring you to grief, or some great misfortune. I hope he will; I hope he will. Instead of trying to hold her up in the world, you have tried every way in the world you can to disgrace her. I should think you would be so ashamed of yourself that you couldn't do enough to atone for the wrong you have done her. I love her, and I just hate you. It is well I am not her, or I would advertise you from one end of the world to the other. But she feels herself so much of a lady that she too tamely submits to your insults. Why, you are not good enough for me to wipe my shoes on, much less her. If you knew how insignificant you looked to-day,—although I, a poor girl, and you could ride in your carriage. I feel really so much above you that I ask Mr. Dobinson to take my message rather than come in contact with yourself.

"The message of insult which you returned to me by Mr. Dobinson was so farcical that I had to laugh in Mr. Dobinson's face, and ask: 'Don't you think that man crazy?' I am a poor girl, but I feel myself so much better than you—you horrible, horrible man.

MISS BRACKETT."

No further intercourse or communication is known to have taken place between the parties, and no public declaration or claim concerning the alleged marriage was made, until September 8, 1883, when one William Neilson procured the arrest of the plaintiff on the charge of adultery, alleging that he was the husband of the defendant; and soon after published a "Dear Wife" letter, the original of which has never been produced, and also the alleged declaration of marriage, to cancel which this suit was thereupon brought.

The defendant's account of the execution of the declaration of marriage, and the intercourse between herself and the plaintiff, which preceded it, is substantially as follows: In the summer of 1880, and before August 25th, by invitation of the plaintiff, she visited him to get points on stocks. During one of these visits the plaintiff proposed to give her \$500 a month to let him "love her;" in other words, to be his mistress. She declined the offer, and he raised the sum to \$1,000, which she also declined, saying: "You are mistaken in the woman. You can get plenty of women that will let you love them for less than that." With that she rose to depart, saying she would not come any more, when the plaintiff put his back against the door, and said she was mistaken; that he was really in love with her, and wanted to marry her; when she replied: "If that is what you want we will talk about that." Nothing more of any moment occurred on this occasion, but whether it was a day or a month before August 25th

she is unable to say. However, on that day, she returned to the plaintiff's office, and accepted his proposition of marriage, without any further preliminaries. Then the question arose as to how they should be married. He wanted the marriage secret, as he had a *liaison* on hand with a woman in Philadelphia, who would make trouble if she heard of it, which might injure his chances for a re-election to the senate from Nevada; and said that under the Civil Code they could marry themselves privately, by the execution of a writing to that effect, to which she appears to have readily assented. Thereupon, at his suggestion, she sat down at his table, and wrote at his dictation, and at one sitting, the alleged declaration of marriage, which he then signed and returned to her, whereupon, without any more ado, they quietly separated, she going to her lodgings at the Galindo Hotel, and he to Virginia, Nevada, where he remained some weeks, without any communication passing between them, until very shortly before the letter of September 25th, which he addressed to her at the Baldwin; that soon after the receipt of this letter she removed, at the request of the plaintiff, from the Baldwin to the Grand, and continued to live there in room 208, until December, 1881, during which period she was in the habit of visiting the plaintiff in his rooms at the Palace, day and night, and received from him the sum of \$500 a month, with which to pay her bills.

On the other hand, the plaintiff swears positively that he never signed the declaration of marriage; that he never saw or heard of it until it was made public in September, 1883; that he was never married to the defendant in any way; that he never addressed her as his wife, in writing or otherwise; and that he never knew or heard that she made any claim to be his wife until that time.

The originals of the declaration and "Dear Wife" and other letters written by the plaintiff to the defendant not being in his possession, and she refusing to produce them and put them in evidence, he was allowed to put in evidence photographic copies thereof, made from the originals when introduced by her in *Sharon v. Sharon*. The copies of the letters were put in evidence, against the objection of the defendant, for the purpose of showing that the correspondence between the parties was not such as would naturally pass between husband and wife; and, further, for the purpose of showing that the defendant had been guilty of forgery, by changing the address of five of these letters from "My Dear Allie" or "Miss Hill" to "My Dear Wife," for the purpose of supporting and strengthening her claim that the declaration of marriage is genuine, and was signed by the plaintiff.

The declaration is in the words and figures following:

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, state of California, age 27 years, do here, in the presence of Almighty God, take Senator William Sharon, of the state of

Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon, of the state of Nevada.

SARAH ALTHEA HILL.

"AUGUST 25, 1880, SAN FRANCISCO, CAL.

"I agree not to make known the contents of this paper or its existence for two years, unless Mr. Sharon himself see fit to make it known.

"S. A. HILL.

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Senator William Sharon, of the state of Nevada, age 60 years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city of San Francisco, Cal., to be my lawful and wedded wife, and do here acknowledge myself to be the husband of Sarah Althea Hill.

WM. SHARON.

"Nevada, Aug. 25, 1880."

The following are copies of the five "Dear Wife" letters, the one in ink being first, with the letter to Thorn, referred to therein:

[Exhibit 13.]

"*My Dear Wife*: In reply to your kind letter, I have written Mr. Thorn, and inclosed same to you, which you can read, and then send it to him in an envelope, and he will not know that you have seen it. Sorry that anything should occur to annoy you, and think the letter will command the *kind courtesy* you deserve. Am having a very lively and hard fight, but think I shall be victorious in the end. With kindest consideration, believe me,

"WM. SHARON."

[Exhibit 38.]

"AGENCY OF THE BANK OF CALIFORNIA.

"VIRGINIA, NEV., October 16, 1880.

"*Mr. Thorn*—MY DEAR SIR: I gave Miss Hill a note to you, and expected the kind consideration for her which she deserves. But it seems you have not been as accomodating as you might be. You will consider my wishes in this and allow no cause of complaint.

"Very truly,

WM. SHARON."

[Exhibit 29.]

"*My Dear Wife*: inclosed send you by Ki the balance, two hundred and fifty, which I hope will make you happy. Will call this evening for the joke.

"Yours,

S.

"April 1, [1881.]"

[Exhibit 11.]

"*My Dear Wife*: You have had one hundred and twenty. Then twenty, and before I left one hundred. In all, two hundred and forty, (240.) The balance is just two hundred and sixty, for which find cash inclosed. I am afraid you are getting extravagant.

SHARON.

"May 5, 1881."

[Exhibit 16.]

"*My Dear Wife*: Inclosed find three hundred and ten dollars to pay bills with, etc.

W. S.

"August 29, 1881."

[Exhibit 37.]

"PALACE HOTEL, SAN FRANCISCO, October 3, 1881.

"*My Dear Wife*: Inclosed find five hundred and fifty dollars, which will pay expenses until I get better. Will then talk about your eastern trip. Am much better to-day. Hope to be up in three or four days. Truly,

S."

The following are copies of the three other letters in pencil. The first was written near Christmas, 1880, and the other two in the spring of 1881:

"*My Dear Allie*: Come over and join me in a nice bottle of champagne, and let us be gay before Christmas. W. S.

"If you don't come over and take part in the bottle, I may hurt myself."

"PALACE HOTEL, SAN FRANCISCO, 188—.

"*My Dear A.*: Come and take dinner. Answer."

"*Miss H.*: Have ordered a nice dinner, and have a sample bottle of wine want you to try."

Eight witnesses were examined as to the genuineness of the signature to the declaration and the "Dear Wife" letters. Three of these—Mr. C. D. Cushman, Mr. Samuel Soule, and Mr. M. Gumpel—were called by the defendant.

Cushman did not speak as an expert, but simply as one having a knowledge of the plaintiff's handwriting, obtained during some years spent in his employ. His general standing and character are not questioned, but it is claimed, and apparently with good reason, that for some cause he has made himself a very bitter partisan, in this case, of the defendant, from the time it was mooted.

Soule is 78 years of age, and professed to speak as an expert, or a "judge of handwriting," on very slender grounds. His opinion is based on a comparison made out of court with writings not produced or admitted to be the plaintiff's. Both he and Cushman, on these grounds, testify that the writings in question are genuine, but in my judgment very little weight ought to be given to the opinion of either of them.

Gumpel is a lithographer, and an expert of considerable experience, besides being in some respects a very remarkable penman. But his relation to the case, and his conduct as a witness therein, are both suspicious and unsatisfactory, and lead me to regard him and his testimony with distrust. On October 16, 1883, he writes to the attorney of the plaintiff, Mr. Barnes, suggesting that the other side wished to retain him as an expert, but he preferred to be employed by Mr. Barnes, and is anxious to know if he wants him. Afterwards he was retained by the plaintiff as an expert, and examined the disputed writings, prior to the trial of *Sharon v. Sharon*, so far as he had an opportunity. On the trial of that case he was not called as a witness by the plaintiff, because, as he says, he had told Mr. Barnes he could do him no good. Thereafter, according to his statement, he met the defendant's attorney, Mr. Tyler, on the street, with whom he had not spoken for two years, and against whom he had "a great grudge" on account of some former "bad" treatment, who immediately ran up to him, begged his pardon for the past, and asked him to be a witness on his side of the case. To this the witness replied,

"I think you have a great deal of audacity to speak to me;" and, after some further parley, said: "You know how to secure the attendance of a witness;" and added, "If you subpoena me in this case, I give you due warning that I will bust your case higher than a kite; look out!" Notwithstanding this friendly warning, which looks as if it was given and received in a Pickwickian sense, Mr. Tyler had the witness subpoenaed, and he went upon the stand and swore that the signature to the declaration was genuine, and that the "Dear Wife" letters were written by the plaintiff, and were not tracings, which testimony he repeated in this case. On his examination in chief the witness was very confident that he could detect any tracings,—said he had done so "at the first glance" in the case of *Treadwell v. Bank of California*,—but on being asked on cross-examination to say which of plaintiff's exhibits, 200 and 201, was the tracing, and which was the original,—the one being a letter written by the plaintiff on January 5, 1885, to an expert witness, and the other a tracing thereof, made by the latter,—he sulked and would not answer. Said he would if he had a month to examine them in, and the plaintiff would pay him for his time. His opinions on the subject of the writings are mere bald assertions, unsupported by any intelligent or convincing reasons. He first pretended that his "method" was a secret, and spoke of it as something unusual and even occult, that he could not explain. But afterwards he was compelled to admit that he had no special "method," but simply compared the one writing with another, and came to a conclusion, from their resemblance or dissimilarity, whether they were written by the same person or not. I repeat that I am constrained to regard his connection with the case with suspicion, and his testimony as unsatisfactory, and with distrust. The possibility of his having written the disputed signature himself will be considered further on.

Of the five witnesses called by the plaintiff on this point, Dr. R. M. Piper is the most important. He appears from his own account, and this is corroborated by the work he has done in this case, to be an expert of celebrity, and a microscopist of experience and distinction. After the trial of *Sharon v. Sharon* he was employed by the plaintiff to come here from Chicago, and give his time and attention to the examination of the writings in this case, without any understanding as to the amount of his compensation, except that it should be satisfactory to him. This circumstance has been animadverted on by counsel, and in considering the credit due to his testimony it cannot be overlooked by the court. Upon this arrangement his compensation may be, and in some degree probably is, contingent upon success. But there is nothing very unusual in this; and until experts are nominated by the court and paid by the state, the circumstance of their being retained by the parties must always be considered in estimating the value of their evidence. And in this connection it may also be noticed that Dr. Piper, being a comparative stranger

here, was, on cross-examination, very properly asked concerning the antecedent circumstances of his life, and that for some reason he failed to give any account of the same for a period of several years after his majority, and his graduation as a doctor of medicine at Dartmouth College. Dr. Piper's microscopic work in this case covers a large field. His numerous tables of enlarged drawings or tracings present the characteristics, similarities, and differences of these writings plainly and in detail. With the aid of the *camera lucida* he has made drawings of the disputed signature, portions of the "Dear Wife" letters, and the defendant's letters, the Gumpel imitation of the plaintiff's signature, and his admitted signature to bank-checks; and of sundry words, letters, and terminals of each, so as to make apparent to ordinary observation any singularity of formation, feature, or proportion that may serve to distinguish or identify either of them. Assuming that his observations and delineations are correct, to the contrary of which nothing appears save the surmises and conjectures of counsel, he has accumulated a great mass of material facts, from which any person of ordinary intelligence and power of observation and deduction may draw a comparatively safe conclusion as to the question in dispute, so far, at least, as the same can be determined by an inspection of the writings themselves. A peculiarity in the formation of a letter or the manner of writing a word, that, under ordinary circumstances, would not be discerned or apprehended, when magnified several hundred times, becomes as noticeable as the features of the human face. Dr. Piper states that a person, in writing, usually makes his terminals and "t" crossings with less care or consciousness than any other part of the word; from which he deduces the conclusion, and a very plausible one, to say the least of it, that a person engaged in making a tracing of another's writing is apt to betray himself by lapsing into his own habit or style at these points. The tables of enlarged terminals and "t" crossings, taken from the admitted writings of the parties, show a very marked difference; those of the defendant being blunt or clubbed at the latter end, while those of the plaintiff are generally lighter, and invariably pointed or tapering at the termination. They also show that the terminals and "t" crossings in the "Dear Wife" letters are in this respect very like the defendant's and unlike the plaintiff's. On the whole, Dr. Piper's unqualified conclusion is that the signature to the declaration was not written by the plaintiff, and that it was written by the witness Gumpel; and that the "Dear Wife" letter in ink, and, at least, the word "wife" in the other two, known as "Exhibits 11 and 37," are tracings made by the defendant.

Besides Dr. Piper, the plaintiff called on this point Mr. H. C. Hyde, Mr. R. C. Hopkins, Mr. J. P. Martin, Mr. J. H. Dobinson, and Mr. F. W. Smith. The latter three are very familiar with the plaintiff's writing. Mr. Martin was in his employ as book-keeper, cashier, and otherwise, for 10 or 15 years. Mr. Dobinson has been his pri-

vate secretary since 1876, and Mr. Smith has been the paying teller of the Bank of California since 1879, during which time he has probably paid hundreds, if not thousands, of the plaintiff's checks. And from their knowledge of the plaintiff's writing they are decidedly of the opinion that the disputed signature is not his.

Hopkins has been the keeper of the Spanish archives in the United States surveyor general's office in this state for the past 30 years, and during that time has been much engaged in studying writings with a view to determining the question of their integrity, and making tracings of Spanish grants and documents. He says that he cannot state positively whether the signature to the declaration is the plaintiff's or not; but he is certain that it was written there before the body of the instrument was, and that the "Dear Wife" letter in ink is a tracing. Hyde is a well-known and experienced expert. He made the tracing on which Gumpel declined to give an opinion. On the trial of *Sharon v. Sharon* he said, without having made any special examination of it, that he thought the signature to the declaration genuine; but now, after a thorough examination of the subject, he says he is certain that it is not genuine; and that the "Dear Wife" letter in ink is a tracing with the word "wife" "built in;" and on this latter point his explanation of the matter is *clear* and *convincing*.

After an examination of the face of the instrument under the microscope, both Hyde and Piper are of the opinion that the signature to the declaration is written in different ink from the body of the instrument, and that the latter was written after the paper had been folded, as shown by the spreading and absorption of the ink where the pen crossed a fold; and this is plainly indicated by the enlarged drawings prepared by the latter. On the whole, the expert testimony, both in skill, character, and numbers, preponderates largely in favor of the plaintiff, and proves with as much certainty as such evidence well can that the signature to the declaration is false and forged, and that the "Dear Wife" letter in ink, and, at least, the word "wife" in the others, are tracings made by the defendant of letters written to her by the plaintiff with the word "wife" substituted for "Miss Hill" or "Allie." And this conclusion coincides with the impression made on my own mind by the examination of the writings.

The signature to the declaration is a good general imitation of the plaintiff's, and without special observation might easily pass for his. The signature of the plaintiff is generally well marked and uniform, but often varies in minor particulars. Perhaps none of the hundreds of them offered in evidence is more unlike the disputed one than the signature on the check of the same date with the declaration. The "a" in the check signature is closed at the top, while in the other it is open; and the lower limb of the "h" in the former leaves the stem at the line, while in the other it returns on the stem, or follows it upwards for some distance. But in other signa-

tures of the plaintiff these differences from the disputed signature do not appear; at least, not so plainly. But in the disputed signature the "S" in "Sharon" is nearly a third longer than the "h," but no such difference or peculiarity appears in any of the plaintiff's admitted signatures. On the contrary, the "h" in all of them that I have seen is fully as long, and sometimes longer, than the "S." Again, the up-strokes of the "W" in the plaintiff's signature, and particularly the second one, are uniformly heavier than the down-strokes, while in the disputed one the contrary is the case.

And besides, and over and above all these particulars, there is a difference in the general effect and appearance of the signatures that is more readily felt than expressed. One may see at a glance that two pictures, which have a general similarity, are not portraits of the same person, when it might be difficult to give a satisfactory reason for the conclusion. The disputed signature is evidently the work of a skillful penman. The lines are comparatively smooth and steady, while the exact contrary is characteristic of the plaintiff's writing. Indeed, I very much doubt if he could write such a signature as the one to the declaration.

Who did write this disputed signature, it is not absolutely necessary to decide. So far as the evidence goes, it was not written by the plaintiff, and may have been written by the witness Gumpel. Dr. Piper, speaking as an expert, says he did write it. He denies it; but it may nevertheless have been done by him, not feloniously, but as an idle fancy or aimless experiment. For, whoever wrote it, I think there is nothing in this case more evident and certain than that this signature was not written after this declaration but before it, and therefore with no apparent wrongful intent. In the fall of 1883, and while Gumpel was understood to be in the employ of the plaintiff as an expert, he wrote, from memory, in Capt. Lee's office, the signature of the plaintiff, with the *addenda*, "Nevada, Aug. 25, 1880," which is much more like the signature to the declaration than any of the plaintiff's admitted signatures. And, so far as the genuineness of these disputed writings depends on the testimony of the parties, the preponderance of the evidence is with the plaintiff. In any view of the matter, the testimony of the plaintiff neutralizes that of the defendant. Whatever deductions may be made from his credibility, on account of his participation in this transaction and interest in the result, must also be made from hers, and even more; for, in the very nature of things, this is a game in which the woman has more at stake than the man. And, however unfavorably the plaintiff's general character for chastity may be affected by the evidence in this case, it must not be forgotten that, as the world goes and is, the sin of incontinence in a man is compatible with the virtue of veracity, while in the case of a woman, common opinion is otherwise. Nor is it intended by this suggestion to palliate the conduct of the plaintiff or excuse the want of chastity in the one sex



more than the other, but only, in estimating the relative value of the oath of these parties, to give the proper weight to the fact founded on common experience, that incontinence in a man does not usually imply the moral degradation and insensibility that it does in a woman.

And it must also be remembered that the plaintiff is a person of long standing and commanding position in this community, of large fortune and manifold business and social relations, and is therefore so far, and by all that these imply, specially bound to speak the truth, and responsible for the correctness of his statements; and all this, over and beyond the moral obligation arising from the divine injunction not to bear false witness, or the fear of the penalty attached by human law to the crime of perjury. On the other hand, the defendant is a comparatively obscure and unimportant person, without property or position in the world. Although apparently of respectable birth and lineage, she has deliberately separated herself from her people, and selected as her intimates and confidants doubtful persons from the lower walks of life; and, so far as appears, is only amenable to legal punishment for any false statement that she may make in this case, which all experience proves is not sufficiently certain to prevent perjury in legal proceedings. And by this nothing more is meant than that, while a poor and obscure person may be naturally and at heart as truthful as a rich and prominent one, and even more so, nevertheless, other things being equal, property and position are in themselves some certain guaranty of truth in their possessor, for the reason, if none other, that he is thereby rendered more liable and vulnerable to attack on account of any public moral delinquency, and has more to lose if found or thought guilty thereof than one wholly wanting in these particulars.

But this is not all. There is much in the testimony of the defendant in this case that must affect her credibility unfavorably. It is full of reckless, improbable, and in some instances undoubtedly false statements. Take this one, for illustration. The story that some time in 1880, and prior to the date of the alleged marriage, she gave the plaintiff \$7,500 to invest in stocks for her, is undoubtedly false; and she has attempted to support it, not only by perjury, but by forgery. Perceiving that the payment to her, under the circumstances, of that large sum, shortly before she left the plaintiff's hotel, bore upon its face the evidence that it was given to a discarded mistress rather than a deserted wife, she deliberately swore, both in *Sharon v. Sharon* and in this case, that the transaction was a return to her of that amount which she had put into the plaintiff's hands some 18 months before for investment; and not only that, but she produced on the trial in the former case, to support her statement, a writing to that effect, purporting to be signed by the plaintiff and witnessed by Nellie Brackett. But when asked, on cross-examination, to produce that paper here, she declined to do so or to answer any question about it. And Nellie Brackett swears that the writing was manufactured

by the defendant; that she copied the signature of the plaintiff from one in an autograph album, and that she witnessed it at the defendant's request, upon an understanding that it was only to be used to influence her lawyers, and the defendant afterwards quarreled with her because she would not go on the stand and swear to it. And while it may not be safe to accept any statement on the uncorroborated testimony of this young woman, the innate improbability of the defendant's story, and her refusal to produce the paper, or answer concerning it, is ample corroboration. And in a suit brought by the defendant against the plaintiff in the superior court, in May, 1884, on the agreement given in part payment of this sum of \$7,500 to recover the installments due thereon for October, November, and December, 1883, amounting to \$750, it was found by said court, sitting without a jury, that said writing was given to the defendant on November 7, 1881, "in consideration of past illicit intercourse between them," and also in consideration of a written receipt and promise to the plaintiff by the defendant "to make no further demand upon him, and not further to annoy him in any manner." And while it is possible that, notwithstanding the falsehood of the defendant in this and other respects, the alleged declaration may be genuine, it must be conceded that neither that fact, nor any circumstance tending to prove the same, can be established by her uncorroborated oath.

Another circumstance strongly contradictory of the defendant's account of this transaction is the fact that nearly a year after the pretended advance, and before its alleged return, she deliberately obtained from the plaintiff a contract to hold 100 shares of Belcher for her, to be paid for on delivery. Now, if the plaintiff then owed the defendant \$7,500, which, according to her account, had also been advanced to him for the very purpose of being invested in stocks, why hold these stocks for payment absolutely? Why not credit her on the contract with the amount due her from the seller, and agree to deliver on payment of the balance of \$2,500? Or, what would be more natural still, why not deliver her stock at once for the amount due her? Nor is this transaction, viewed in any light, the kind of intercourse we might expect between a fond old millionaire and his darling young wife in the fourth moon of their marriage. It follows that on the testimony of the parties, as well as that of the experts, the decided weight of the evidence is against the genuineness of the declaration and letters.

And now let us see what the evidence is, on the face of these documents, as to their genuineness or falsity. Of the many circumstances that might be mentioned under this head, a few of the most striking must suffice. The declaration is written on note-paper instead of legal-cap, although written in an office well supplied with stationery for business purposes. It is written on the first half sheet instead of a whole one. It begins at the top line of the second page instead of the first one, and is finished back on the unruled space at the top of the latter. The signature of the plaintiff is on the top line

of the first page, where it might have been written as an autograph or imitation, or even without any purpose; and, considered as a signature to a legal instrument, has the unusual and unmeaning appendage, "Nevada, Aug. 25, 1880;" and this, although that date, and the fact that the alleged signer was of Nevada, was already stated three times in the body of the writing. It is full of verbose formalisms and useless repetitions, and in structure and verbiage is just what might be expected from a stylish, half-educated woman, and is altogether unlike what might be expected from the dictation of a person of experience, brevity, and directness, such as the plaintiff appears to be. The last four lines are written much closer than the others, and the words contained in them are crowded together, and two of them abbreviated; and even then there was barely room for the matter without trenching on the signature, after omitting certain words and parts thereof—19 in number—which were used in corresponding and foregoing parts of the instrument. Counsel for the plaintiff has called attention to these omissions in his brief, by inserting them in red ink. Substituting italics for the red ink, the omissions appear as follows: "The presence of Almighty God, take Sarah Althea Hill, of the city *and county* of San Francisco, *state of California*, to be my lawful and wedded wife, *and* do here acknowledge *and declare* myself to be the husband of Sarah Althea Hill, *of the city and county of San Francisco, state of California*." Taking common experience and observation in such matters as a guide, the most satisfactory inference from the facts on the face of the declaration is that the body of it was written after and over the signature. I know it was said on the argument, and there is force in the suggestion, that if the instrument was premeditatedly written over a signature, either genuine or false, in a matter of so much moment as this, the writer would most likely have experimented with the subject until the matter was got into such form and number of words as would conveniently fill the space preceding the signature, without stretching, crowding, or omission. But the conclusion already stated, that the signature was written before the declaration, is by far the most reasonable inference from the evidence afforded by the document itself; and this cannot be overcome or made doubtful by mere plausible conjecture as to what a prudent and skillful person would or might have done under the circumstances; for this is not the first time in which persons engaged in an illegal or criminal transaction have strangely or foolishly, as it appears to others after the fact, omitted to take some very simple precaution to prevent detection or failure.

The "Dear Wife" letters have nothing wifely about them except the word "wife" in the address. The four in pencil are short, curt scrawls, announcing the sending of money, presumably on account of her monthly stipend of \$500, with a jocular remark or familiar expression added, such as a guardian might write to his ward, or an attorney to his client. They are dated in different months, and ap-

parently relate to monthly payments. The one of April 1st says, "I send you the 'balance,' two hundred and fifty dollars;" and the one of May 5th says, "You have had at different times [mentioning them] two hundred and forty dollars; the 'balance' is two hundred and sixty dollars, which find inclosed." The "balance" of what? Why the "balance" of the \$500 a month the plaintiff was paying her on some account. There is not a particle of love or affection in the letters; not even enough to suggest that she was his mistress. The ink letter is longer and more formal. It was written in reply to one from her soon after she took up her residence in the Grand, in which she had evidently complained that the plaintiff's manager, Mr. Thorn, had not treated her properly. So far as this complaint was well founded, it probably arose from the fact that the manager suspected she was more than a boarder and less than a wife. But there is nothing wifely in this letter either, except the word "wife" in the address. The writer hopes that the inclosed letter to Mr. Thorn will command the "kind courtesy," not respect, she deserves, and the letter to Thorn is to the same effect. There is not a particle of love or affection in it from one end to the other. It is such a letter as the plaintiff might have written to Miss Hill, but hardly to his young bride of less than two months' existence. And there are some particular circumstances connected with this ink letter which prove it to be a tracing beyond a doubt.

The plaintiff swears that he wrote the original of the ink letter at the same time that he wrote the inclosed one to Thorn, at the agency of the Bank of California, in Virginia, and on its paper. The one to Thorn, which passed through the hands of the defendant, shows on its face that it was so written. The two letters were practically one transaction with one person, and were inclosed in one envelope to the defendant. Under these circumstances the only reasonable conclusion is that they were both written on the same kind of paper. But it was a difficult and tedious task to trace the lithographic head on this paper, nor is it likely that it was obtainable here. So the tracing was made on plain paper, and on its face betrays its fraudulent origin, and furnishes another striking instance of the truth of the proverb, "murder will out." The photographic copies of the declaration and letters indicate that the originals are worn and soiled, and the witnesses who have seen them say that such is their appearance. But this appearance has been put upon them to give color to the assertion that they are originals of some years' existence, which have been carried about and seen hard usage, and particularly were not fresh tracings on new paper. Nellie Brackett swears that the soiling and crumpling process was a part of their manufacture; that the defendant wet them with coffee grounds, and ironed them, and held them over the gas, and the like, to give the new smooth paper the appearance of age and use. Ah Sam, the defendant's Chinese servant, at Laurel place, gives a very graphic account of the

process. He says he lived with her "two Christmases ago," and saw her with papers in the kitchen, which she put dirt and coffee on to make them look old and yellow, and that he ironed them for her.

The defendant's answer to this evidence is that she buried the documents for safety in a tin can in the cellar, where, strange to say, they got wet, but whether from the sprinkling of the street or a shower does not appear, and she afterwards ironed them to dry and smooth them. But this does not account for the corners of some of them, and particularly the upper ones of the ink letter, having the appearance of being burned off, as though they had got singed in the gas. And the story indicates that she then had a great deal more concern for the safety of her "papers" than when she left them in a loose roll on the wall behind a picture at Martha Wilson's; and, taken altogether, it is evidently a weak invention of the defendant's in support of what she knows to be false and forged writings. And thus one falsehood begets another from the beginning to the end of this case.

When compared with the usual and ordinary conduct of married men and women under like circumstances, there is such incongruity and want of harmony between the "Dear Wife" address of these letters, and the general tone and subject-matter of them, that they must be, as the plaintiff insists, and the evidence already considered is sufficient to show, at least in the one instance, the tracings of a genuine letter, with the word "wife" substituted for "Miss Hill" or "Allie," and in the others genuine letters in which a like substitution has been made.

But the defendant relies largely, in support of her case, on what may be called contemporaneous evidence of the existence of these documents, and her own declarations concerning the same, and her relation with the plaintiff, to third persons, in the nature of *res gestæ*. For instance, she testifies that she told her uncle, Mr. W. R. Sloan, while she was still at the Grand, that she was secretly married to the plaintiff, because he suspected something wrong, and threatened "to break every bone in Sharon's body;" and that she subsequently showed him the declaration and letters at Martha Wilson's house, soon after she left the Grand; that she did not tell her brother, or aunt, Mrs. W. J. Bryan, but did tell her grandmother, Mrs. W. J. Brawley, of the marriage, but at what time does not appear. She also testifies that she told Mary E. Pleasant of the marriage while at the Grand, and, soon after she left that place, showed her the declaration and letters; that she also showed the declaration to Martha Wilson, and read it to her on October 14, 1880, and that Vesta Snow was present, and read it at the same time, to whom she also showed the letters after she left the Grand; and that she showed both declaration and letters to Nellie Brackett early in 1882.

Nellie Brackett first met the defendant in the early part of 1882. She was then about 17 years of age, and the defendant made a sort of a confidant and dependent companion of her. In August, 1882,

the defendant went to live at Mrs. Brackett's, where she remained until the middle of November, when she moved elsewhere, taking Nellie with her, against the wishes of her parents, and keeping her so until near the close of the year 1883, when the quarrel took place on account of the latter's refusal to swear to the forged receipt, as already stated. On the trial of *Sharon v. Sharon* she was called as a witness by the defendant, and testified that she had seen the declaration and letters as early as March, 1882; but, on being recalled by the plaintiff, she said her former testimony was false in that respect; and she testifies in this case that she never saw the Sharon letters until June or July, 1883, and there was then no one of them addressed to the plaintiff as "wife," and she did not see the declaration until some time after that. The defendant testifies that in the summer of 1882 she renewed her friendly relations with the plaintiff, and visited him occasionally at his rooms at the Palace, and that at one of these visits she took Nellie with her, and secreted her at night behind the bureau in the plaintiff's room, so that she could see him and her go to bed together, and hear what they said and did while there, with a view of having her testify to the same, if need be,—particularly anything that indicated they were married,—as she was afraid the defendant might deny the declaration. Nellie Brackett now testifies that this story is wholly false; that the defendant concocted it in the fall of 1883, and had her learn it by heart, and go on the stand in *Sharon v. Sharon* and swear to it. For the honor of her sex, I trust she tells the truth about it now; for I would much quicker and rather believe that the defendant was wicked enough to commit perjury than that she or any other woman was vile enough to do such a dirty thing with this young girl.

Martha Wilson is a poor, nervous little negro woman, born a slave, who can neither read nor write. While the defendant was at the Grand she employed her occasionally as a seamstress, and had breakfasts from her restaurant. The defendant made much of her, and sought refuge in her house when she was expelled from the Grand, and was there off and on for some time. On the trial of *Sharon v. Sharon* she swore, when called by the defendant, that the declaration was shown and read to her by the defendant and Vesta Snow at her house on Mary street, on October 14, 1880, when the defendant called for her to go with her to the furniture factory to obtain some special articles for her rooms at the Grand on the written order of the plaintiff of that date; and the testimony of the defendant and Vesta Snow is to the same effect in this case. But Martha Wilson, being recalled by the plaintiff in *Sharon v. Sharon*, testified that she never saw or heard anything of the kind until late in the fall of 1883, when the defendant showed her the declaration, and induced her to swear to this falsehood out of sympathy and a promise of \$5,000, and that she took Vesta Snow, who was in her employ at the time, to the defendant, where she was also shown the declaration, and induced to swear to

this story. On her cross-examination, when recalled in *Sharon v. Sharon*, she contradicted herself badly, and evidently was made to say what she did not intend, and what was not true. But here she tells a lucid, plain story, and explains that on that cross-examination she was so stormed and raved at by Mr. Tyler that she did not know what she was saying.

But it has been shown beyond a doubt that the key-note of this story, the meeting of the parties at Martha Wilson's house, on the date of the furniture order, is totally false. Vesta Snow says she went to Martha Wilson's house that day, October 14th, at the request of Martha's husband, to ask her to come to the restaurant then kept by her at 644 Mission street; and she remembers the one circumstance by the other, and that Martha Wilson had a restaurant at that place on that day, and so says the defendant. But the landlord and the mechanics, who furnished and fitted up the restaurant, swear, and produce their books of original entry to support their statements, that Martha Wilson did not occupy the place until some time in November, and probably as late as the 10th. And soon after the trial of *Sharon v. Sharon*, Martha Wilson was indicted in the state court for perjury in denying that she had seen or heard read the declaration as stated by the defendant. Upon this indictment she has since been tried, both the defendant and Vesta Snow being witnesses against her, and found not guilty.

Vesta Snow is a woman of doubtful repute, who has worked for Martha Wilson, and appears to be keeping a cheap lodging-house. She testifies in this case, as in *Sharon v. Sharon*, that she saw and read the declaration at Martha Wilson's house, on October 14, 1880; and also that soon after the defendant left the Grand she went one day to San Jose, and that while she was gone she (Vesta Snow) went to Martha Wilson's, and they took a bundle of the defendant's papers from behind a picture on the wall, and she looked over them, and read them "some," and the declaration, and sundry "Dear Wife" letters signed "Sharon," and a furniture order of October 14, 1880, were among them. Now, one item of this statement is undoubtedly false. The defendant obtained the furniture on the order of October 14, 1880, and delivered it to the person in charge, and did not have it in 1881. Mr. Cushman, her witness, swears that he was then in the plaintiff's employ at the factory, and received the order, which, by accident, was not placed among the factory papers, but kept by him, and that the defendant never saw it again until October 13, 1883. And the rest of the story is too absurd and unreasonable for any credence. For who can believe that the defendant, smarting under her recent expulsion from the Grand, would leave papers of so much importance to her as this declaration and these letters in a loose package behind a picture on the wall, at Martha Wilson's, for Vesta Snow and other busybodies to pry into and meddle with, while she was gone to San Jose? And yet the defendant

does not hesitate to back her witness, and swear she left the papers behind the picture, as Vesta Snow states, and adds that when she came back she met her uncle there, and took him into the dining-room and showed him the documents. So, then, this kind of contemporaneous evidence is reduced to Vesta Snow, who appears unworthy of credit, and Mary E. Pleasant, of whom more hereafter.

But why are not her relatives called, to whom she says she disclosed the fact of her marriage to the plaintiff, and particularly her uncle, to whom she says she made the disclosure while she was at the Grand, and to whom she says she showed the declaration at Martha Wilson's soon after she left there? What more probable than, if she could get the testimony of persons like these to verify her claim and corroborate her statements, she would not be leaning on such broken reeds as Snow and Pleasant? Counsel for the defendant, when pressed on this point during the argument, replied that it was not competent for the defendant to prove her own declarations in support of the writing or the marriage; but if the plaintiff wanted to contradict her in this respect, he could have called those persons for that purpose. But it was time enough to discuss the question of competency when the objection was made by the plaintiff. If the defendant really believed that she could prove these acts and declarations of hers by these relatives, she would have called them, of course. It may be admitted that the competency of the proof was in part open to argument; but that would not have prevented her from offering it, at least, especially as she did introduce testimony of the same kind. If the declarations as to the marriage or the existence of the declaration were made during her residence at the Grand, they were, in my judgment, admissible as a part of the *res gestæ*, (1 Whart. Ev. §§ 258, 259; 2 Greenl. Ev. § 462; 1 Bish. Mar. & Div. §§ 438, 540;) but certainly it was competent to call her uncle to prove that he had seen the declaration of marriage and "Dear Wife" letters at Martha Wilson's house just after the defendant left the Grand. These relatives are admitted on all hands to be respectable people, and it is a very suspicious circumstance that not one of them, not even the brother, is called or appears to support the defendant in any way. Her omission to call them to corroborate her statements is an admission that they would not do so because they could not. It is true that the plaintiff might have called them in rebuttal to contradict the defendant; but as she in effect admitted, by not calling them, that they would not corroborate her, that was sufficient for his purpose, and he might well refrain from needlessly bringing them into painful prominence in this unpleasant and unsavory affair.

Mary E. Pleasant, better known as Mammie Pleasant, is a conspicuous and important figure in this affair, without whom it would probably never have been brought before the public. She appears to be a shrewd old negress of considerable means, who has lived in San Francisco many years, and is engaged in furnishing and fitting



up houses and rooms, and caring for women and girls who need a mammie or a manager, as the case may be. The defendant states that she became acquainted with this witness early in 1881, and soon after told her of her marriage, and showed her the documents; that from the time she had the trouble with the plaintiff she put herself under her direction and control, and by her advice suppressed all allusion to herself as the wife of the plaintiff in the letters she wrote him after she had been ordered from the hotel; and, as an excuse for this extraordinary abnegation of herself and affairs in favor of this old woman, she swears:

"Mammie Pleasant was old, and had the experience, and she had the experience of lots of *girls and women*,—had the experience of the world; and being a servant, and being a wife, and being the head of families, I took her advice and wrote just about what she would dictate. \* \* \* I was much of a baby."

Mammie Pleasant has taken charge of this case from the beginning, and, to use her own phrase, is making the defendant's "fight," whom she supports, and to whom she was forced to admit, after much evasion, she has advanced more than \$5,000, and how much more she would not tell. In my judgment, this case, and the forgeries and perjuries committed in its support, have their origin largely in the brain of this scheming, trafficking, crafty old woman. She states that as early as 1881 the defendant wanted her to furnish her house at a cost of \$5,000 or \$6,000 on the strength of her relations with the plaintiff. But it seems that Mammie was not certain that the plaintiff could be held liable for the expense, and so she called on her counsel, Mr. Tyler, and stated the case to him, without, as she is careful to say, mentioning any names; but said that the man owned two hotels, and was living in one of them, and the woman in the other, which, under the circumstances, is equivalent to saying "the party of the other part" is William Sharon. After due deliberation, Mr. Tyler gave her a written opinion, which she says cannot now be found, to the effect that such a contract as she mentioned and he suggested was a lawful marriage, under the Code, and the supposed man who owned two hotels (the Palace and the Grand) would be legally liable for the expense of furnishing his "Code" or "contract" wife with a suitable residence, although he was then maintaining her at a cost of \$500 a month at the Grand. Mr. Tyler admits that in the fall of 1881, or the spring of 1882, he was consulted by the witness, as she states, and that he gave her a written opinion to the effect that the man would be liable; but I am quite certain that, if the real date of this conversation is ever satisfactorily ascertained, it will be seen that it took place in 1883. But however this may be, defendant and the witness being thus instructed or informed as to what constituted a valid contract or declaration of marriage under the Code, in due time, and by means best known to themselves, produced this document, which as a legal composition is worthy of its origin, and which, in the language of the

senior counsel for the defendant, is beneath the learning and skill of a "jack-legged lawyer."

On the other hand, a number of apparently respectable witnesses testify to declarations and conversations of the defendant during her residence at the Grand and afterwards that are utterly irreconcilable with the idea that when they were made she had any idea she was the wife of the plaintiff.

Mrs. Mary H. Brackett, the mother of Nellie, says the defendant lodged at her house from early in August to late in November of 1882, and that shortly before she left she told her that she had been engaged to the plaintiff, but it was broken off. Her brother, she said, was opposed to the match, because Sharon's "pedigree was inferior to hers." She also said he was a shriveled-up old man, anyhow, whom no one would marry out for his money.

Mrs. Sarah Millett, formerly Sarah Orr, was for a long time seamstress at the Grand. Her room was near the defendant's, and they appear to have been quite intimate. She swears that while the defendant was living at the hotel she told her the plaintiff was her beau, and that just before he left for Washington, in January, 1881, he wanted her to go with him and be married privately, which she declined to do, and was since sorry for it; and this she said many times, including the last night when she was in the hotel, when the witness was lying on the bed with her. In the spring of 1882 this witness called to see the defendant on Ellis street, when the latter begged her to bring herself and Sharon together again, promising, if he married her, to give the witness a house and lot.

Mrs. Sarah Morgan heard the defendant say at Mrs. Hardenberg's lunch table at Oakland, in August, 1881, that her engagement with Sharon was broken off, and that she was going east and may be to Europe; and that in 1880, and after August 25th, she told the witness that she was "engaged to be married to Senator Sharon."

Mrs. Harriet Kenyon was with the defendant as maid, except for one week, from September 11 to the latter part of November, 1881. The facts stated in her testimony are altogether incompatible with the idea that the defendant was, or even wanted to be, the plaintiff's wife, but rather that the old love for the lawyer was on again, whom she visited slyly, and dined with at the Verein club, and came home speaking of him as, "———, sweetie, how I love you!"

Mrs. Nellie Bacon knew the defendant slightly when she first lived at the Baldwin. In the fall of 1880 she went to the Grand to board, where she remained until April, 1881. She says that during this time she saw the defendant daily, and she said the plaintiff was paying her attention, and might propose to her; that a proposal from him involved "many delightful things, and one not so delightful,—his advanced age;" but that she preferred the lawyer to any of her lovers. In January, 1881, when the plaintiff went to Washington, the witness, at the request of the defendant, draughted a letter for her to the

plaintiff, designed to make him propose or compromise himself, which she copied and sent to him; but soon after the plaintiff returned from Washington she said she had trouble with him, and was afraid he would never marry her.

It is true that the defendant denies all these statements, and speaks contemptuously of the people who make them as persons beneath her notice. But they appear to have been her associates, even in her better days, and there is not a circumstance in the case that makes against the integrity and character of either of them. Besides, it won't do to sneer at these people while she consorts with Vesta Snow and Mammie Pleasant. Add to this, her credit is so badly damaged that her unsupported statement is not sufficient to overcome, or even seriously impair, the effect of positive testimony from unimpeached and, so far as appears, unimpeachable witnesses.

And, lastly, let us consider how the existence of these documents, and the claim of the defendant that she is the wife of the plaintiff since August 25, 1880, comport or correspond with the situation of the parties at the time, and their daily walk and conversation since. In August, 1880, the plaintiff was in the decline of life, in the possession of a very large fortune, with a family of grown-up children, to whom he was much attached. As was said in *Holmes v. Holmes*, 1 Sawy. 119, in speaking of a person somewhat similarly situated: "With him the primary object of marriage, the procreation of children, had been long accomplished; and the secondary one, the avoiding of fornication, does not appear to have much concerned him." The defendant was a mature young woman, of rather prepossessing appearance and tolerable attainments, with some years' experience in hotel life and stock speculations. During the past eight or ten years she had lived in comparative luxury and ease on money derived from her family. But early in 1880 she found herself without means, and the losing party in a protracted game of hearts, for which she sought, but without effect—

"To give repentance to her lover,  
And wring his bosom"—

by committing suicide in his presence.

In this desperate condition she met the plaintiff, an unmarried man, with the reputation of a Giovanni, and, without any formal introduction, accepted an invitation to his private office to "talk stocks," which soon ended, as she must have expected, if not desired, in talking about herself. If this interview had ever taken place, as the defendant relates it, it was much more likely, under the circumstances, to have ended in an arrangement by which the plaintiff would pay her \$500 a month to be his convenient friend, than that he should then and there make her his wife, and admit her to an unqualified marital right and interest in his immense fortune. Taking the defendant's account of the transaction, the pages of fiction furnish no parallel to

the singular and unnatural conduct of these parties. There was no preliminary courtship, but barely an acquaintance between them. They came together fortuitously in the stock operations of California street, and their personal intercourse began with a proposition from the one that the other should be his mistress, which she declined, apparently without being offended, when he, unable to control his sudden passion, offered her marriage, which she readily accepted. After a few words of parley as to the *modus operandi*, she agreed to a secret marriage, to be evidenced by a writing under the Code, executed by the parties, but unattested by witnesses. Thereupon the defendant, at the suggestion and dictation of the plaintiff, wrote at one sitting, *currente calamo*, this unique declaration, without altering or correcting a word or phrase therein, to which the latter then signed his name, adding, I suppose, by way of emphasis, the words, "Nevada, Aug. 25, 1880." And then, without more ado, without even a parting kiss or fond embrace, they went their several ways as if nothing more had happened than a deal in Belcher; not knowing, and apparently not caring, whether they should ever meet again. This ardent lover, whose fervent affection led him to back the offer of his pléthoric purse with his widowed hand, turned his back on the lovely and consenting Althea to give his heart and soul to the study and control of Nevada mines and politics, while she, in the pathetic language of counsel, remained "an ungathered rose."

They separated without any arrangement for the future, and no communication passed between them for weeks thereafter; and none appears to have taken place until about the date of the letter to her at the Baldwin, which reads more like a solicitation for an assignation than a communication from a husband to a wife. During this time the Galindo Hotel burned down, and she was compelled to seek new lodgings, and went back to the Baldwin. She admits that she never informed her alleged husband of the occurrence or her whereabouts, and when asked to explain this singular conduct, she could do no better than give this frivolous and flippant answer, which carries its refutation on its face.

"I knew when he came down, [from Nevada,] if he wanted to see me, he could find me. I don't think it necessary for wives to run after their husbands. I didn't take the trouble to notify him where I had gone to. I thought, if he cared so much for me as he pretended to, he would find me. I am not in the habit of running after people."

The defendant's idea of what a wife would or should do, under such circumstances, is evidently not founded on experience, and, judging from her conduct and the explanation of the same, it is evident that she has yet to feel the tender solicitude that a true woman has for one to whom she has given her heart and hand in holy wedlock. And, now, could anything be more unnatural and improbable than this? There is no escape from the conclusion,—the conduct of the parties

was contrary to human nature and common experience, and makes the story of the marriage utterly incredible, even if it was not contradicted by the oath of the plaintiff.

But the conduct of the parties, after they found one another, also contradicts and is altogether irreconcilable with her claim of marriage, and stamps with the mark of falsehood and forgery the declaration and letters relied on to support it. It is apparent that the defendant went to the Grand to live in pursuance of some arrangement with the plaintiff soon after the letter to her of September 25, 1880. This is plainly indicated by the contents of the letter to her from Virginia, inclosing the one to Thorn, and of that also. But during her 15 months' residence there, the parties, so far as appears, never addressed or spoke of one another, in public or private, orally or in writing, as husband and wife, or said anything that implied such relation. Nor does it appear that any such claim was ever made or admitted by either of them, under any circumstances. The intercourse between the parties, so far as is known, or may be inferred from the evidence, was of a familiar and somewhat commonplace character, but utterly wanting in the tender consideration and respect usual and proper between husband and wife in their station of life.

The character of his letters to her has already been commented on. They are very brief, and either relate to the payment of her allowance, or contain an invitation to dinner, which plainly implies that she was not in the habit of sitting at his table or expected there, unless specially invited. They are utterly void of affection, and altogether lacking in mention or even allusion to the numberless and nameless little incidents and affairs peculiar to every married couple, and which, taken together, constitute the charm as well as the staple of married life; and, although Christmas and New Year passed, and a birthday came to her while there, it does not appear that she ever received a present, greeting, or other token of affection from the plaintiff.

But there are convincing proofs in the conduct of the parties, other than these general and negatives ones, against this claim of marriage. Take the circumstance of concealing herself in the plaintiff's rooms, and watching him and another undress and go to bed together, and the indifferent and indecent levity with which she carried the story to the seamstress. Waiving the moral insensibility which such conduct implies, it is inconceivable that a wife could witness such a scene without some manifestation of anguish, if not anger, and, what is worse, that she could regard it as a good joke, and gleefully relate it as such to others. Speaking of the affair, she says, "I laughed at it, and told it to a good many people. It was a very amusing affair to me." Afterwards, when she came to sign her deposition, and had had time to reflect, and perhaps receive a suggestion, she seems to have realized the damaging nature of her admission, and said that, although she laughed at the affair, she was "angry" too. But whether

she was "amused" or "angry," or whether she laughed simply or with a laughter akin to tears, she did not act like a wife.

Towards the close of the year 1881 the plaintiff had evidently gotten tired of the defendant, or distrusted her, and probably both. Moved by these considerations he had a settlement with her, in which he gave her \$7,500, as already stated, for which she gave him a receipt in full of all demands, soon after which he had her summarily, and against her abject petition and remonstrance, expelled from the hotel. Now, if the plaintiff was married to this woman, and knew she had the written evidence in her possession of that fact, it is not reasonable or probable that he would have gone to such extremity with her; and, although it may be claimed that he acted on the supposition that she had lost the declaration, and she swears she told him so, for the purpose of preventing him from getting it away from her, he must have known that, if she had letters of his addressed to her as "Dear Wife," they were as good weapons in her hands as the declaration itself. However, it is sufficient to say that his conduct on this occasion was anything but that of a husband. In fact, he never, so far as appears, treated her otherwise than as a plaything or fancy for which he was paying as he went, and expected to as long as it suited him.

But the conduct of the defendant on this occasion is enough, in my judgment, to settle this question against her, even if the plaintiff was silent on the subject. When she was ordered to leave the hotel, she wrote the plaintiff three letters in quick succession, beseeching him by every consideration that occurred to her to allow her to remain on the old footing under his roof. If at the time she believed herself to be his wife, it is impossible that she should have written these abject appeals to the plaintiff, every word and syllable of which read like the wail of a poor discarded friend or mistress, and not the confident and certain reply of an outraged wife, conscious of her rights and her power to assert them. It is not necessary, and space will not permit, to call attention to these letters in detail. They are contemporaneous conduct of the defendant, at the most important crisis in her relations with the plaintiff, and their purport cannot be misunderstood. The mere perusal of them is enough to convince any one that they were not written by a wife to her husband. These honored terms do not even appear in them. In her direst distress she dare not address him as husband, or call herself his wife. The highest ground on which she bases her appeal for mercy is "friendship,"—an indefinite term which might well be used to characterize the relation between any unmarried man and woman. She asks the question, would you "stoop to injure a *girl*, and one whom you have pretended to love?" And again she says: "Don't do things now that will make *talk*." What "talk" is she afraid of but "talk" about their doubtful or illicit relations? Further on she urges her claim in language that cannot be misunderstood for that of a wife:

"Mr. Sharon, you have been kind to me. I have said I hoped my God would forsake me when I ceased to show my gratitude." "I had hoped to always have your friendship and good-will throughout life, and always have your good advice to guide me." "I valued your friendship more than all the world. Have I not given up everything and everybody for it?" "I have always been kind to you, and tried to do whatever I could to please you, and I hope at least, in your unjust anger, you will let us *apparently part friends*, and don't do or say anything that could create or make any *gossip*."

"Gossip" about what? That the defendant was the plaintiff's wife, and they had been secretly married. Was that what she was afraid of? No, not at all; but rather that she was his leman, and had misbehaved herself and been discharged. The plaintiff took no notice of her wail, and she was compelled to go. But she was not without hope that they might be friends again, and in the summer of 1882 she appears to have been in the habit of calling on him at the Palace, but her calls were never returned; and in August of that year she wrote the plaintiff the remarkable letter known as the "Us Girls" or "Egg and Champagne" letter. It is given above in full, and speaks for itself. How any one can have the hardihood to claim that it was written by a wife—and a deeply injured one—to a cruel and unfaithful husband, is more than I can understand. It is apparently the work of an artful woman who is anxious to get her net over the head of a wayward old millionaire again, and recall him to her side once more,—not so much for love as moonlight drives, visits to the springs, lovely days in the country, egg in champagne, and the like; and, distrusting the power of her own familiar charms and honeyed phrases, she adroitly contrives to put young "Nell" in the foreground, as a fresh lure to the wary old bird.

Sometime after this the defendant took Nellie Brackett with her to the Palace, and the plaintiff had them both put out of the hotel; whereupon the letter signed Miss Brackett, and known as the "Old Sharon" letter, was written and sent to the plaintiff. The defendant says the letter was written by Nellie Brackett, but that she knew of it and approved it; but I think there is no doubt but that she dictated it, or wrote it herself, and had Nellie copy it. But that is not very material to my present purpose. Certainly the writer of this letter never dreamed that the defendant was the wife of the man she was berating; and if Nellie wrote it, it is another cogent circumstance to show that she did not know of the alleged marriage, or the existence of the disputed documents, and that the defendant's statement, that she had before then told her of the one and showed her the other, is untrue; and to this effect is Nellie Brackett's testimony. But if it was written or dictated by the defendant, it is only another link in the long chain of independent and indisputable circumstances contradictory of the defendant's claim and testimony. The writer speaks of the defendant as "a motherless, fatherless *girl*, \* \* \* alone in the world," and leaves no room for even an implication that she ever thought of her as the wife of any one. The style and matter

indicate that the defendant can be fierce and abusive as well as wheedling and fond; but she had no thought then that the person she addressed as "you horrible, horrible man" was her own dear husband.

The character and contents of these five letters of the defendant are too damaging to her claim to be passed over in silence. They could not be directly denied, but a weak attempt has been made to palliate them. The defendant first took refuge in the secrecy clause of the declaration, which bound her not to make its contents "public" for two years, although it is probable that the last two of these letters were written after that period had expired. She said she was advised that if she did not keep that promise the marriage would become void, or the plaintiff would make her trouble, and therefore she did not feel at liberty to address him, even privately, as his wife or her husband, even when he was driving her from his presence and protection. It is not likely that any lawyer ever gave her any such absurd advice, and, as she has failed to call the adviser to corroborate her statement, that story may be dismissed. However, on being confronted with some imaginary conversations she says she had with the plaintiff during this period, in which she told him to his teeth that she was his wife and meant to have her rights as such, she fell back on her good genius, Mammie Pleasant. She says she wrote the letters and wanted to do so as the plaintiff's wife, but this wise old manager would not let her write a word to the plaintiff indicating that she was his wife, for fear it would "rile" him and make trouble. This is a very flimsy story, and altogether unworthy of credit. To one who has seen and heard the defendant in court, and has read the report of her examination before the examiner, the idea that old Mammie Pleasant, or any one else, could control her tongue or pen in her intercourse with the plaintiff is simply ridiculous. Neither is it reasonable that she, or any one else, would regard it as a violation of the secrecy clause in the declaration for her to address the plaintiff in private as his wife, and to insist on being treated accordingly. She did, according to her own statement, tell a number of persons before this of the marriage, and she says she did not think that was making it "public." Then, how could she imagine she was not at liberty to speak of the matter in private to "the party of the other part?"

But the inconsistency of her conduct, compared with her claim, does not stop here. For more than a year after the expiration of the secrecy clause she made no sign or pretense of being the plaintiff's wife. During this time the plaintiff paid her no attention, but treated her as a person he was well rid of. Her financial resources were daily diminishing as she neared the end of the provision made for her by the plaintiff in the fall of 1881. There was no longer any reason why she should not openly address the plaintiff as his wife, and demand recognition and support from him accordingly. Not only



this, but she had every reason now to exhibit her documents to her brother and other relatives, and at least claim their countenance and advice. But, instead of this, she gave herself and her cause into the keeping of an old woman, who appears to be no better than a go-between, and one William Neilson, of whom the counsel for the plaintiff said, on the argument, without objection or reply from any one, as a reason for not having taken his testimony: "It was not thought worth while to tarnish the record with any statement he might make." And through such agencies and advice as Pleasant's and Neilson's, she finally, on September 8, 1883, without a note of warning to or demand on her alleged husband, precipitated her case on the public in a melodramatic and roundabout way, by having the plaintiff arrested for adultery, on the assumption that he was her husband, and soon after publishing the declaration and what purported to be a "Dear Wife" letter. But the original of this letter has never been produced, and the defendant on her examination admitted that she never had one like it. Nellie Brackett swears that it was addressed, "My Dear ———," and that the defendant afterwards spoiled it in trying to substitute the word "Wife" for the dash. Her testimony on this point is substantially as follows:

"After Mr. Sharon's arrest, Neilson said he would publish the letter addressed 'My Dear ———' as 'My Dear Wife.' Miss Hill said she did not like that, because she had no such letter. Neilson said he would see that she had a 'Wife' letter out of that one that had a dash on it. After four or five weeks, he not attending to it, she tried to fix that letter herself and spoiled it."

Her testimony is strongly corroborated by that of the defendant, and squares with the admitted facts and probabilities of the case. But the effect of this circumstance does not stop here. The transaction furnishes another convincing argument against the existence of the "Dear Wife" letters as late as September, 1883; for if the defendant had had the "Dear Wife" letters when Neilson published the admitted spurious one, she would certainly have furnished him one of them for publication.

Neilson's relations with the defendant at that time, and his position in the affair, are not doubtful. He was her agent and adviser, and knew as well as she did that she then had no "Dear Wife" letters. This will appear from the agreement between her and her counsel for the division of the prospective fruits of this predatory litigation. On October 24, 1883, Mr. Tyler made a written agreement with the defendant, she signing it as "S. A. Hill," for the prosecution of a suit against the plaintiff for the vindication of her good name and a division of the common property, which they subsequently alleged to be of the value of \$10,000,000, for one-half of what he might recover. The agreement contains a clause to the effect that Mr. Tyler will not settle with Sharon without the consent of the defendant "and her agent, William Neilson," who doubtless was an agent with an interest, and well advised in the premises. The only inference to be drawn

from these facts is that on September 8, 1883, and until some time afterwards, the "Dear Wife" letters were not in existence. The tracing and alteration had not then been done. The conspiracy had not progressed so far. No credible witness swears to having seen them earlier than September 26th; and if any one had, in the light of these facts, it would be considered a mistake. R. P. Clement says he saw them between September 26th and October 10th; C. D. Cushman says on October 20th; Samuel Soule says on November 23d; and W. B. Tyler says in October. Vesta Snow and Mammie Pleasant are the only persons who say they saw them earlier.

I have thus gone over the salient points in this case at some length. Much more might be said on minor points to the same effect. But this, in my judgment, is sufficient to show that, humanly speaking, it is not possible that this declaration of marriage was ever signed by the plaintiff, and that it is morally certain that both it and the "Dear Wife" letters are false; that they were practically forged by the defendant, by writing the declaration over a simulated signature, and by making tracings and alterations of letters from the plaintiff to herself, and substituting in the address thereof the word "Wife" for "Miss Hill" or "Allie," and omitting at the end of the one in ink the words "yours truly;" and that the claim of the defendant to be the wife of the plaintiff is wholly false, and has been put forth by her and her co-conspirators for no other purpose than to despoil the plaintiff of his property. In this undertaking, doubtless, the proverbial sympathy of the multitude for an attractive young woman, engaged in an affair of this kind with an immoral old millionaire, was largely relied on to make the conspiracy successful. But in a court of justice such considerations have no place. Here, at least, the conduct of the parties must be measured and characterized by the evidence, and have effect according to the law in such cases provided.

A woman who voluntarily submits to live with a millionaire for hire ought not, after she finds herself supplanted or discharged, to be allowed to punish her paramour for the immorality of which she was a part, and may be the cause, by compelling him to recognize her as his wife and endow her of his fortune. If society thinks it expedient to punish men and women for the sin of fornication, let it do so directly. But until so authorized, the courts have no right to assume such function, and, least of all, by aiding one of the parties to an irregular sexual intercourse, to despoil the other, on the improbable pretense that the same was matrimonial and not meretricious.

The question of whether there was a marriage between these parties, assuming the defendant's statement to be true, does not directly arise in this case. This suit is brought to annul the written evidence of the alleged marriage, on the ground of its falsity, and to enjoin the defendant from setting it up or using it to the prejudice or injury of

the plaintiff. But, in determining this question, the conduct of the parties during the time it was claimed they were living under this instrument as man and wife has necessarily been examined, and found not to support such claim. And, so far as the element of consent in this alleged marriage depends on this declaration, the conclusion that it is false is equivalent to a determination that there was no marriage between the parties, and that their intercourse was meretricious.

But I cannot refrain from saying, in conclusion, that a community which allows the origin and integrity of the family, the corner-stone of society, to rest on no surer or better foundation than a union of the sexes, evidenced only by a secret writing, and unaccompanied by any public recognition of each other as husband and wife, or the assumption of marital rights, duties, and obligations except furtive intercourse, more befitting a brothel than otherwise, ought to remove the cross from its banner and symbols, and replace it with the crescent.

The plaintiff is entitled to the relief prayed for; and it is so ordered.

SAWYER, J., (*concurring.*) The following statement of the proceedings in this case will present the points of law decided: The bill was filed October 3, 1883, the object being to cancel, as a forgery and a fraud, an alleged written declaration of marriage, a copy of which is set out in the bill. A subpoena was thereupon issued, and on October 3, 1883, duly served on the respondent, who entered an appearance on the next rule-day, November 3, 1883. On November 1, 1883, nearly a month after the filing of the bill and service of subpoena in the case, the respondent, by the name of Sarah Althea Sharon, filed a complaint against William Sharon, complainant herein, in the superior court of the city and county of San Francisco, wherein she alleged that on August 25, 1880, she and said Sharon, by mutual agreement, became husband and wife, and commenced cohabiting together as such; that, "inasmuch as said marriage had not been solemnized in the mode provided by section 70 of the Civil Code of California, the plaintiff and defendant jointly made a declaration of marriage in writing, signed by each of them, substantially in form required by section 75 of the Civil Code of California, and until the month of November, 1881, the plaintiff and defendant lived and cohabitated together in said city and county as husband and wife;" that on or about November 5, 1881, defendant demanded of the plaintiff in said suit a surrender of said declaration of marriage, and threatened violence if she refused to comply with his demand,—“refused to recognize his said marriage with plaintiff, and drove plaintiff from him, and refused to live or cohabit with her for more than a year, thereby willfully deserting her.” In addition to desertion, she alleged numerous acts of adultery with other women, as further grounds for divorce. She then prays “that her marriage with said defendant may be declared legal and valid;” “that she may be divorced from said defendant;”

and for a division of the common property, alleged to be of more than \$10,000,000 in value. On November 10, 1883, defendant, William Sharon, filed his answer to said complaint in the superior court, denying all the allegations relating to the marriage, and averring that said alleged declaration of marriage in writing is a forgery and fraud. On November 22, 1883, defendant, Sharon, removed the case to this court, on the ground that he was a citizen of the state of Nevada, and plaintiff a citizen of California; and the transcript of the record was filed in this court two days thereafter, on November 24, 1883. On December 3, 1883, the plaintiff in said suit gave notice of a motion, based on the record in the case, to remand the same to the state court, on the ground "that the said circuit court has no jurisdiction in the suit, neither of the subject-matter thereof nor of the parties." Without bringing this motion to a hearing, on December 31, 1883, on application of plaintiff's attorneys therein, and on stipulation of counsel, as follows: "It is hereby stipulated by and between the respective parties that the above-entitled suit be remanded to the superior court of the city and county of San Francisco, state of California, whence it came,"—it was "ordered that the above-entitled cause be, and the same hereby is, remanded to the superior court of the city and county of San Francisco." After the case had been thus remanded to the superior court, on January 3, 1884, a stipulation in the following language, signed by the attorneys of the respective parties, was filed in said superior court:

"It is hereby stipulated and agreed, by and between the respective parties to this suit, that the above-entitled cause may be assigned to department 2 of said court, and tried by Hon. J. F. SULLIVAN, without a jury."

In the mean time, on the rule-day next succeeding her appearance in this court, December 3, 1883, respondent, Sarah Althea Hill, filed a demurrer to the bill in this suit, which was argued and submitted on January 21, 1884, and after due consideration overruled March 3, 1884, in an opinion reported in 10 Sawy. 48, and 20 Fed. Rep. 1.

On April 24, 1884, after two extensions by the court of time to plead, a plea *in abatement* was filed by respondent, alleging (1) another suit pending in the superior court for the same cause,—said suit of *Sharon v. Sharon*; (2) that complainant, Sharon, was, at the commencement of the suit, and still continued to be, a citizen of California, and not of Nevada, as alleged by him. A replication to this plea was filed May 5, 1884. The case then, in pursuance of the practice of the court, went regularly upon the calendar of the July term, 1884, for trial of the issue on the plea in abatement; and on the regular call of the calendar, in pursuance of the rules and practice of this court, on July 14th, the first day of the term, it was set down for hearing for September 2, 1884. On September 2d, upon being regularly called in its order, the hearing was continued to October 15, 1884. On October 15th, the case, upon being regularly reached and called in its order, was submitted for decision by the counsel for com-

plainant, in pursuance of rule 44 of this court, no counsel appearing for respondent. The case was submitted on the pleadings, without evidence, none having been taken, more than five months having elapsed since the case was at issue on the plea, and the time for taking testimony having long before expired, no extension of time for taking testimony having been granted, or applied for by either party. On October 16, 1884, the plea was found false, and overruled on that ground, there being no evidence to support it. See opinion of the court, reported in 10 Sawy. 394, and 22 Fed. Rep. 28.

Leave to answer to the merits within 30 days having been given, and the time having been from time to time extended, an answer was finally filed on December 30, 1884, in which the allegations of the bill, including the allegation of the citizenship of complainant, were denied; an attempt being thereby made, without leave of the court first obtained, to again raise, in the general answer, the issue of citizenship, before determined and adjudged on the plea in abatement. No application had been made or leave granted for a rehearing on the plea in abatement, or to reopen that issue, already passed into judgment, and the interlocutory decree adjudging the plea false and overruling it was still in full force. A replication to the general answer having been filed, and the case put at issue January 2, 1885, the parties, shortly thereafter, proceeded to take testimony. During the time these proceedings were going on, the trial of the said divorce suit of *Sharon v. Sharon* was commenced in the said superior court on March 10, 1884, and continued from time to time until September 17, 1884, when it was finally submitted to the court for decision.

On February 18, 1885, the court filed its findings of fact and conclusions of law, and ordered a decree in favor of complainant, granting a divorce, which decree was entered upon the findings on February 19, 1885. In the decree, after reciting that it is "found that plaintiff and defendant intermarried in August, 1880, and that the defendant deserted the plaintiff in December, 1881," "it is ordered, adjudged, and decreed that the plaintiff and defendant are husband and wife, and that the marriage now existing between the plaintiff and Sarah Althea Sharon be, and the same is hereby, dissolved, and that said parties are, and each of them is, freed from the obligations thereof."

The second finding of the court in said case is as follows:

"That on the twenty-fifth day of August, A. D. 1880, the plaintiff and defendant each signed a certain declaration of marriage, in the words and figures following, to-wit: [Here is set out the contract in the same language and form as set out in the bill in this suit, and in the opinion of my associate, and also as it appears in 10 Sawy. 48, and 20 Fed. Rep. 1;]—which was the only written declaration, contract, or agreement of marriage ever entered into between said parties, and, at the time of signing said declaration, plaintiff and defendant mutually agreed to take each other as, and henceforth to be to each other, husband and wife."

The third, fourth, eighth, and ninth findings are as follows:

"(3) That afterwards, and about the —— day of September, 1880, the plaintiff and defendant commenced living and cohabiting together, in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year, and down to the twenty-fifth day of November, 1881, and during all of said time plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations. (4) That during the time plaintiff and defendant so lived together, defendant visited her relations with her, escorted her to places of amusement, and introduced her to respectable families and to members of his own family, and wrote to her several letters, while absent from her, in which he addressed her as 'My Dear Wife.'" "(8) That it is not true, as stated in the answer of defendant, that plaintiff has either falsely or fraudulently assumed the name of Sarah Althea Sharon; but, on the contrary, that it is her real name. Nor is it true that she or any one forged the document mentioned in the complaint and heretofore set forth; on the contrary, the said document is genuine, and was signed by the plaintiff and defendant at the time it purports to have been signed. (9) That defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to nor of him to other persons in his presence as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife."

On February 26, 1885, the defendant, Sharon, took and perfected an appeal from said judgment of the superior court to the supreme court of the state, and gave a bond of such character as, under the statute, to operate as a *supersedeas* and a stay of all proceedings pending the appeal, and the case now stands pending on appeal and undetermined in the supreme court of the state. After the rendering of the said judgment in the state court in said case of *Sharon v. Sharon*, the respondent presented to this court a certified copy of the pleadings, findings, and judgment (or decree) therein, and asked leave to file a supplemental answer in this case, setting up such record as *res adjudicata*, and praying a stay of proceedings in this case "until the judgment in said case of *Sarah Althea Sharon v. William Sharon shall become final*;" thus recognizing the fact that said judgment had not yet "*become final*." The complainant, in response, presented a copy of the record, showing that a suspensive appeal had been taken, and was then pending. On March 4, 1885, leave was given to file the supplemental answer, and it was filed; but the court reserved the determination of the effect of the proceedings set up in the supplemental answer until the final hearing of the case, and denied the motion to stay proceedings until the judgment shall "*become final*" in the state court. It also appeared, upon the final hearing, that defendant, Sharon, moved for a new trial in said case of *Sharon v. Sharon* in the superior court, and that said motion for new trial is still pending and undetermined in said court.

On March 9, 1885, in resisting an application on the part of complainant to compel the respondent in this case to produce certain papers before the examiner to be used in evidence, the respondent

urged that the bill did not allege the citizenship of the parties in such form as, upon its face, shows jurisdiction in this court over the case, and for that reason the court had no authority to make the order. This objection, after argument and full consideration, was overruled, and the bill, on that point, sustained in an opinion reported in 10 Sawy. 635, and 23 Fed. Rep. 353.

In resisting a further order to show cause why certain papers should not be produced before the examiner for purposes of evidence in the case, on April 20, 1885, the respondent filed several affidavits tending to show that the complainant, Sharon, was not, at the commencement of the suit, or at any time afterwards, a citizen of Nevada; but was during all the time a citizen of California, and therefore that the court had no jurisdiction over the case, and consequently no jurisdiction to make the order sought. The court, in a decision reported in 10 Sawy. 666, rejected the affidavits, on the grounds that the question of citizenship had been conclusively and finally determined *for this case* on the plea in abatement,—the decision and interlocutory decree adjudging the plea false being still in full force,—and that there was no longer an open issue in the case on the question of citizenship; also, on the ground that the issue, if open for trial, would not be determined upon *ex parte* affidavits, but only as one of the issues in the case. Notwithstanding these rulings, the respondent put in testimony before the examiner, under and subject to the objection of the complainant that it is immaterial and irrelevant to any open issue in the case, and, at the hearing, insisted that the issue was still open, and that the testimony should be considered, and the issue again decided on the evidence as *then presented*. Respondent's counsel also insisted upon again arguing the question made and decided on the demurrer, that the bill does not state a case for equitable cognizance. The court, being fully satisfied with its former decisions on these points, overruled the application of respondent's counsel, and declined to hear further argument upon them.

Upon the foregoing state of facts the points of law to be considered arise. It is first insisted that the complainant is estopped from litigating the validity of the alleged marriage contract in this case in this court, by the stipulation mentioned, in pursuance of which another case—the said case of *Sharon v. Sharon*—was remanded to the state court. It is claimed that by that stipulation all the matters in controversy between these parties were agreed to be litigated in the state court alone; but nothing of the kind appears, expressly or inferentially, in the stipulation. It makes no reference to this case at all. That case was commenced in the state court, and removed to this court by the defendant therein under the act of congress of 1875, on the supposition that he had a right to try it in the courts of the United States. The plaintiff in the case denied that right on the face of the record, on the grounds that the subject-matter—it being a suit for divorce—was not within the jurisdiction of this court in any event, and

that it did not appear to be a case for jurisdiction on the ground of citizenship, even if this court could take jurisdiction, in any case, of a suit for divorce. On these grounds complainant moved to remand the case, as having been improperly removed, and, in view of the decision of the supreme court in *Barber v. Barber*, 21 How. 584, the respective counsel may have supposed that there was some ground to believe that the motion might be sustained on the ground of want of jurisdiction over a suit for divorce, had it been prosecuted to a decision. However this may have been, the respondent's counsel, either having doubts upon this jurisdictional point, or for some other reason satisfactory to themselves, concluded not to require the motion to be pushed to a decision, and to permit the motion to be granted. Thereupon they consented, in writing, that the case should be remanded to the court whence it came. This was simply a substitute for the hearing of the motion, and a decision upon it, which, if sustained, would still compel them to go back. They simply submitted to the motion, and the only effect was to return the case to the state court, and place it *in statu quo*. The stipulation had no reference to any other case than that in which it was made, and no other purpose than to return it to the court in which it had been originally brought. It related to that case, and that case alone. It was not intended to affect, and did not in any way affect, this case, which goes upon an entirely different theory, and seeks different relief. The fact that there may be some questions common to both, cannot enlarge the effect of the stipulation in question.

It is also claimed that complainant is estopped from litigating this case in this court by the stipulation of his attorneys, filed in the divorce case of *Sharon v. Sharon*, in the superior court, waiving a jury, and for the trial of the issues of that case in department 2 of the superior court before Hon. J. F. SULLIVAN, judge of that department. But this stipulation, like the other, is only a stipulation as to the course of procedure in that case, having relation to that case, and to no other. Defendant was obliged to have his case tried in some one of the 12 departments of the superior court, and he was liable to have it assigned to any one of those departments for trial. Both parties being satisfied to try it in department 2, they designated that department by stipulation. This was but a substitute for the assignment of the case for trial in the usual mode. It had no other effect than to determine which one of the 12 departments to which it was liable to be assigned should try that particular case, then pending, and ready for trial in the superior court. The effect of the judgment of the court in the case tried in department 2 by reason of this stipulation, as matter of estoppel, is no greater and no less, and in no respect other, than if the case had been regularly assigned to that department for trial by the authority of the superior court, without the stipulation, and against the protest of defendant. This stipulation in no degree affects the action of the court as matter of estoppel.



Neither this stipulation, nor the stipulation to remand to the state court, taken separately,—nor do they in combination,—estop the complainant from proceeding in this case, nor can they in any respect affect this case.

The effect of the proceedings and judgment in the superior court is precisely what it would have been had that case never been removed to this court, and had it been tried in department 2, or any other department to which it had been properly assigned for trial, without the consent or any action of the defendant therein. And there was no possible plausible ground, deducible from the terms of the stipulations, for counsel to suppose that the stipulations affected, or that they could in any way affect, any other case than the one in which they were made. Nor did they, in fact, so suppose; for steps were being continuously taken by them, and the counsel of complainant in this case, without objection, while the proceedings were going on at the same time in the case in the state court. The two cases proceeded *pari passu* in the two courts.

As to the point upon which we declined to hear further argument, that the bill presents no case for equitable jurisdiction, and that, upon the facts stated, this is but a suit for jactitation of marriage, it is only necessary to observe that, upon the hearing on the demurrer, in which these points were argued, Judge SABIN, of the Nevada district, and myself, gave them the fullest and most careful consideration, and upon such consideration we were satisfied that the case is one proper for equitable cognizance. Our views will be found expressed in *Sharon v. Hill*, 10 Sawy. 48; S. C. 20 Fed. Rep. 1. We are now entirely satisfied with the ruling then made, and adhere to it.

We also, at the hearing, declined to hear the evidence offered by respondent, under objection of complainant as to its relevancy, to show that Sharon was, at the commencement of the suit and subsequently thereto, a citizen of California and not a citizen of Nevada, on the issue attempted to be raised, without leave of the court, in the general answer in bar on the merits, by denying the allegation of citizenship in the bill. We declined to consider the testimony, on the ground that there was no open issue in the case on that point, the same issue having been made, tried, and finally determined, for this case, on the plea in abatement. We also declined to hear further argument on the question as to whether the issue was still open for consideration, for the reason that it had been before fully argued in the case and decided, and we were satisfied with the decision. *Sharon v. Hill*, 10 Sawy. 666. We are still entirely satisfied that the issue as to citizenship was conclusively determined, for the case, on the plea in abatement, and was not open for further consideration on the general issue tendered in the answer in bar. Had the question not been raised and determined on a plea in abatement, it may be that, under the act of 1875, respondent might be entitled to raise the issue in the general answer in bar, and have it determined, with

the other issues, at the final hearing of the case. But on that point it is unnecessary now to express an opinion.

Where an issue of fact has been presented and determined upon a plea in abatement, and judgment rendered thereon, until set aside, and the issue has been reopened in some regular course of procedure, such determination of the issue is as conclusive and binding in all subsequent stages of the case as if tried and found at the final hearing, and the issue closed by a final judgment thereon. Conceding that the court had authority to reopen the issue, and allow testimony to be taken, after the time allowed by the equity rules prescribed by the supreme court had expired, there was still but one proper way to proceed, and that was to apply for a rehearing, upon a proper showing, excusing negligence, if any there was, or to set aside the interlocutory decree upon the plea in abatement, and reopen the plea, with leave to take testimony and retry that issue. Even then the reopening of the issue, granting leave to take testimony, and a retrial of the issue, would be a matter for the exercise of a sound discretion by the court, and not a matter of right. No such application, or any application to set aside that interlocutory decree and reopen that issue, has ever been made in the case. Such applications should be promptly made or they should not be granted. Seventy-five days, including extensions granted by the court against the wishes of complainant, elapsed before the general answer to the merits in bar was filed. During all that time, not only was no such application nor any application made to set aside the decision and interlocutory decree entered therein, and reopen that issue, but none has, at any time since, to this day, been made, and the interlocutory decree adjudging the plea false, and overruling it on that ground, now is in full force, unaffected by any order made, or even by any application for an order vacating it, or reopening the issue. On an application, had any been made, the complainant would have been entitled to be heard. It is not an *ex parte* proceeding. *Giant P. Co. v. California V. P. Co.*, 6 Sawy. 529; S. C. 5 Fed. Rep. 197.

The respondent not only did not apply for a rehearing on the plea in abatement, but, in the face of the ruling, and of the interlocutory decree adjudging it to be false, and in defiance of it, without leave of the court, denied in her answer the allegations of the bill as to citizenship, and thereby sought, in that form, without leave of the court, to retry the issue. The questions having been tried and adjudged on the plea in abatement, and that judgment remaining in full force, the complainant was not required, or expected, to put in evidence upon this point under the general issue. He was entitled to rely on the determination already made, until the issue should be again reopened in some proper form; and especially is this so, since the question of the finality of the decree for this case had been determined in an early stage of the proceedings, when raised upon affidavits. It cannot be presumed that complainant tried the case on the question of citizen-

ship in the same manner, or upon the same testimony, as he would have done had the issue been reopened in some proper form. Not only is the view expressed upon this point correct upon principle, but it is the settled doctrine of the supreme court. In *Grand Chute v. Winegar*, 15 Wall. 371, the eighth plea embraced the same matters which had been already set up and passed upon in a plea of abatement, and the court said in regard to it: "*A party having his plea in abatement passed upon by a jury, and found against him, is not permitted to set up the same matter in bar, and again go to the jury upon it.*" And it certainly cannot make any difference whether it is passed upon by a jury or by the court, where no new trial or rehearing has been granted. In the former decision we said: If the question "can be raised again in the general answer, on the merits, there would be no use of a plea in abatement. Such a plea, upon that practice, would only obstruct and prolong the proceedings, and increase the expenses of litigation, without any possible advantage to be gained thereby. The parties are entitled to an opportunity to have an issue once tried and determined. If, through negligence or otherwise, they do not present their evidence, or all of their evidence, the fault is their own, and they must abide the consequences." 10 Sawy. 669.

The provision of section 5 of the act of congress of 1875, relied on by respondent, that "if it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought," that it does not involve a controversy properly within its jurisdiction, it shall be dismissed, doubtless means when it shall appear in some proper mode or form recognized by the rules of law and regularly established practice of the court. It does not mean that the point may be suggested at any time, or in any mode, outside the regular course of the established practice of the court, and tried over and over again, whenever and however the party chooses to suggest it. Such a loose mode of proceedings would be intolerable. It often happens that the defect regularly appears in the record; as where there is a want of proper allegations in the bill, but it has not before attracted the attention of the court; or where it appears in evidence, upon the issues properly open for decision. Whenever this is the case, or whenever the defect is made to appear to the court, in any stage of the proceedings, in its established course of procedure, the court will dismiss the case. This was always the rule on questions of jurisdiction, and the statute but gives express sanction to it, and requires its enforcement by the court of its own motion, whether counsel suggest it or not, without, however, attempting or professing to change the regularly established forms of procedure by means of which the issues shall be developed and tried, and by means of which the defect shall be made to appear. It is as important now to the due, convenient, economical, and speedy administration of justice that questions of jurisdiction, where they do not appear upon the face of the bill, should be determined upon pleas in abatement before going at large

into the merits of complicated cases, requiring long, tedious, and expensive trials, as it ever was. Any other practice would not only be extremely inconvenient, but often intolerably oppressive. We are fully satisfied with the former ruling on the point, and adhere to it. That the issue on the plea in abatement was properly determined in the case there can be no doubt, under the decisions of the supreme court. It is settled by that tribunal that the burden of proof on the plea was on the defendant. *De Sobry v. Nicholson*, 3 Wall. 423; *Shepard v. Graves*, 14 How. 505; *Same v. Same*, Id. 512, 513. And there being no testimony to support the plea, it was properly adjudged false, and overruled.

Whether a party has the right, under the fourteenth amendment, to elect to retain his citizenship of the state of his birth or adoption, after he has taken up his residence temporarily or permanently in another state, is a question which, under the views adopted, we are not now called upon to determine. But see on this point the observations of the court in *Sharon v. Hill*, 10 Sawy. 673, and the cases in support of the affirmative of the proposition there cited from the decisions of the United States supreme court. If one has a right to retain his former citizenship after so becoming a resident of another state, then, even upon the imperfect evidence offered by the respondent, and disregarded by us at the hearing, there can be no doubt that Sharon was, in fact, a citizen of Nevada at the institution of the suit, and that he so continued.

The only remaining question of law to be decided is as to the effect of the findings and judgment of the superior court set up in the supplemental answer. At the time leave was given to file the supplemental answer the court was of the opinion that the matter set up as *res adjudicata* constituted no defense to the bill; but as it could not be known what view the supreme court might take, it was thought that respondent, in case of an adverse decree, would be entitled to have the matter in the record in such form as to be available in the supreme court on appeal, in case this court should be found to be in error upon the point. The application for leave to file a supplemental answer was therefore granted, and the point left open for further consideration on the final hearing. The court denied the motion for a stay of proceedings till the judgment in the state court should become final, for the reason that to do so, and thus give effect to the state judgment, as *res adjudicata*, would, in effect, be to arbitrarily turn the complainant over to the state court for his remedy in a matter wherein the constitution and laws of the United States gave him an absolute, unqualified right to seek his remedy in this court. To have stayed proceedings as asked, would have been equivalent, in its results, to dismissing complainant's bill, and leaving him only such remedy as the state courts afford.

Do the findings and judgment entered therein, set up in the supplemental answer now pending in the supreme court of the state upon

a suspensive appeal, constitute a final determination of the rights of the parties in such sense as to make them *res adjudicata* and available, as such, in this suit as matter of estoppel? We are fully satisfied that they do not. The effect of a judgment, final as to the subject-matter litigated and adjudged, is prescribed in sections 1908 and 1911 of the Code of Civil Procedure of the state of California, and is the same as had been established by the decisions of the courts before it was carried into the Code. To constitute *res adjudicata*, in the sense and with the effect indicated, the judgment should be *final*, not only as to the court in which it is rendered, but also final as to the subject-matter, and not subject to be set aside on motion for new trial, or on appeal. Judgments are said to be final in two senses: final as to the court in which they are rendered, so as to be subject to appeal; and final *as to the subject-matter upon which the judgment is rendered, so as not to be open for further consideration or modification in the tribunal wherein it is rendered, or in any other*. This distinction is clearly recognized in the law in this state and elsewhere.

In *Hills v. Sherwood*, 33 Cal. 478, the court upon this point says:

"A judgment may be a final adjudication in different senses. It may be final as to the court which rendered it, *without being final* as to the subject-matter. 'The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced in.' *U. S. v. The Peggy*, 1 Cranch, 103. Although a judgment may be final with reference to the court which pronounced it, and as such be the subject of an appeal, yet it is not final with reference to the *property or rights affected*, so long as it is subject to appeal and liable to be reversed."

Under the Code "a judgment is the *final determination of the rights of the parties in an action or proceeding*," (Code Civil Proc. § 577;) that is to say, final as to the subject-matter. The Code recognizes the distinction as to judgments final as to the subject-matter and final as to the courts rendering them. Thus, section 936 of the Code of Civil Procedure provides that "a judgment or order in a civil action, *except when expressly made final by this Code*, may be reviewed as prescribed in this title, and not otherwise." "*When expressly made final by this Code*" means, of course, final as to the subject-matter,—final and conclusive of the rights of the parties involved. But section 939 provides that "an appeal may be taken (1) from a final judgment in an action," etc.; "(2) from an order granting or refusing a new trial." See, also, section 963. In these sections it is equally obvious that the word "final" means "final" in the other sense,—"final" only as to the action of the court rendering it. It will be seen that independent appeals are given in the same case,—an appeal from the final judgment in the case, and an appeal from an order granting or refusing a new trial therein; and the several appeals are, in practice, frequently taken at different times, the appeal from the judgment being often first taken, and in such cases generally before the motion for a new trial has been acted upon in the court below.

Section 946 provides that "whenever an appeal is perfected, as provided in the preceding section of this chapter, it stays all further proceedings in the court below upon matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment." And section 1049 expressly provides that "an action is deemed to be *pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed*, unless the judgment is sooner satisfied." By the express terms of this section, therefore, a judgment is not final as to the subject-matter,—is not a final or conclusive determination of the rights of the parties, not only "until the final determination on appeal," but where no appeal has been taken,—"*until the time for appeal has passed.*" Until the time indicated the action is deemed to be pending; that is to say, remains inconclusive, not finally determined, and liable to be changed or altogether vacated and annulled. The action is therefore still pending, and the subject-matter remains *sub judice*. In *Newhall v. Sanger*, 92 U. S. 761, the supreme court held that the lands within the exterior limits of a fraudulent Mexican grant, containing four or five times the amount purported to be granted, were *sub judice*, and not liable to any other disposition until the final judgment of the supreme court, on appeal, rejecting the grant. The judgment in the state court set up is still pending upon appeal, perfected, as provided by the statute, in such mode as to stay all further proceeding on it, except to prosecute the appeal and a motion for a new trial. By the express terms of the statute the action is still "pending" and undetermined. The litigation of the matter in question is not ended in the state court. It is still flagrant. The subject-matter is still *sub judice*, and a matter still *sub judice* cannot possibly be *res adjudicata* in any proper sense of that phrase. To say that a matter *sub judice* is at the same time *res adjudicata* would be a contradiction of terms. The two conditions with reference to the same subject-matter cannot possibly co-exist. Consider the consequences that might follow from the opposing view. Should this bill be dismissed on the plea of *res adjudicata* relied on, and the decree be affirmed on appeal, the judgment in the state court set up might afterwards be reversed, and the case remanded for new trial, or a new trial be granted in the superior court, when the defendant in this case would doubtless endeavor to set up the decree of this court as *res adjudicata* in the case in the state court, and seek a favorable judgment on that ground. Should she succeed, there would be two final and conclusive decrees based upon *res adjudicata*, where there would have been no final adjudication at all on the merits.

A doctrine that may lead to results so absurd cannot be reasonable, or the true one. But the effect of a judgment of a state court, suspended by an appeal, under the laws of California, is settled by the supreme court of the state in numerous cases, even before the adoption of the provisions of the Code herein cited and now in force.

Thus, in *Knowles v. Inches*, 12 Cal. 215, the court says: "This judgment, *suspended by appeal*, cannot be considered as conclusive evidence of the fact of title, even without reference to the manner in which it was obtained." So, in *Woodbury v. Bowman*, 13 Cal. 635, the court says: "The evidence offered on this point seems to have been the judgment roll in the suit of *Mokelumne Hill Co. v. Woodbury*, which cause was then pending in this court upon an appeal," etc. "We think it was properly rejected; an appeal having suspended the operation of the judgment for all purposes, it was not evidence on the question at issue, even between the parties to it." So, also, since the adoption of the Code, in *Murray v. Green*, 64 Cal. 369, the court says: "While the appeal from the judgment in *Porter v. Woodward* was pending, the operation of that judgment for all purposes was suspended, and it was not admissible in evidence in any controversy between the parties. *Freem. Judgm.* 328; *Woodbury v. Bowman*, 13 Cal. 634." *Thornton v. Mahoney*, 24 Cal. 569, and *McGarrahan v. Maxwell*, 28 Cal. 91, are to the same effect. See, also, *Glenn v. Brush*, 3 Colo. 26, and the numerous cases there cited.

Thus the effect of an appeal upon a judgment of the state courts of California, as *res adjudicata*, is settled by the decisions of the supreme court, independently of the present provisions of the Code on the subject. But there can be no possible doubt, it seems to us, under the provisions of the present Code cited, that a case upon appeal is still pending—still *sub judice*—until finally decided, and that it cannot be regarded as *res adjudicata*, or as having any effect as evidence. The effect or value of a judgment in the state court is therefore fixed by the Code and the decisions of the supreme court of the state of California. The effect or value of a judgment of a state court in this court can be no greater than in the state court, as determined by the laws of the state. *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 234. This being so, it will be unprofitable to examine the few cases cited from other states, arising under a different practice, and presenting different conditions, to support the opposing view.

It also appears by the evidence, and it has been repeatedly stated by respondent's counsel during the argument of this case, that a motion for a new trial has been made by defendant, Sharon, in the case of *Sharon v. Sharon*, set up in the supplemental answer, which said motion is still pending and undetermined in the said superior court. The judgment in that case, therefore, is also still subject to be set aside in the court of original jurisdiction, and subject to many contingencies before it can possibly be conclusive on the rights of the parties. A new trial may be granted, even in the superior court, on the ground of the insufficiency of the evidence to support the findings, upon newly-discovered evidence, and on many other grounds, and the granting of a new trial would put an end to the judgment. If denied in the court of original jurisdiction, there may be, as we have seen,

a separate and independent appeal, from the order denying a new trial, to the supreme court, and such order may be reversed, and a new trial ordered, on any of the grounds suggested, and thus the judgment be vacated. On a motion for new trial, and on appeal from an order denying it, the sufficiency of the evidence may be reviewed, and a new trial granted for want of sufficient evidence to justify the verdict or findings.

The supreme court of California has also recently determined the effect of a motion for a new trial upon the finality of a judgment, under the practice in California, in *Gillmore v. American Cent. Ins. Co.*, 65 Cal. 65, 66, the last volume published; S. C. 2 Pac. Rep. 882. The court says:

"Although no appeal had been taken from the judgment within statutory time, proceedings were pending upon a motion made by the defendant in the case to vacate the judgment and grant a new trial. That motion subjected the judgment to be reversed and made it liable to be set aside. The judgment was therefore not final, in the sense of the stipulation as to the right of the parties affected by it, and could not become so until the motion for new trial had been disposed of. *Hill v. Sherwood*, 33 Cal. 474. While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; there is no finality to the judgment in the sense of a final determination of the rights of the parties, though it may have become final for the purposes of an appeal from it."

To hold that a judgment subject to so many contingencies—liable to be set aside in so many ways—is *res adjudicata*; to have finally and conclusively determined the rights of the parties, in such sense that they are no longer open to question in any other proceeding or tribunal—would be but little short of absurd. It might as well be held that the mere bringing of an action would conclude the rights of a party to litigate the same subject-matter in any other jurisdiction. Assuming, therefore, but without deciding the point, the subject-matter of the suit and judgment relied on to be identical with that in this suit, in such sense as would render a judgment final as to the subject-matter, *res adjudicata*, yet in the present condition of the judgment it is still *sub judice* and not *res adjudicata*; and the finding and judgment in no degree estop the complainant from litigating the matter in this case. The defense of *res adjudicata* is overruled.

But if the judgment were final as to the rights of the parties, I am by no means satisfied that the complainant would be estopped by it *in this suit*. There are many strong reasons why he should not be. But it is unnecessary to determine that question now. I only refer to it because my associate has indicated his views upon the point, and I am not now prepared to concur in the views expressed. I therefore reserve my opinion upon the question until it properly arises for judicial determination, and until we can have an opportunity for its full discussion, and mature consideration.

I shall now call attention very generally to some of the salient



points developed in the testimony, and state my conclusions on the material issues of fact, but leave the full discussion of the evidence to my associate.

The great issue of fact in the case is whether the complainant signed the alleged written declaration of marriage set out in the bill. As to this issue but two parties testify who profess to know—others probably do know—whether he did or not, and these parties are the complainant and respondent themselves,—the apparent parties to the contract. The complainant, in the most positive and unequivocal language, denies that he executed the instrument, or that he ever saw it, or heard of it, or heard of any claim of wifehood by respondent under it, or otherwise, till about the time of his arrest for adultery, on the complaint of one Neilson, acting in concert with respondent, on September 8, 1883,—more than three years after its date, and more than a year after the stipulated time for secrecy had expired; and that he never, in his life, saw the instrument until he obtained an inspection of it in November following, under the order of one of the state courts. He also testifies that, according to the best of his judgment, the signature to the contract was not written by him. He is as “positive on the point as human judgment can dictate.” On the other hand, the respondent as positively and unequivocally testifies that complainant did execute the contract; that she wrote it at his dictation, in his presence, and that they both signed it in the presence of each other. They both testify as to matters in regard to which they, respectively, have actual knowledge, and upon which they cannot possibly be innocently mistaken, and matters which could not well have been forgotten or misrecollections. One or the other, therefore, must have knowingly testified to a falsehood. There is no reasonable ground for escaping this conclusion. This being the case, the duty is devolved on the court of determining, so far as it is possible to do so, from all the evidence, and the intrinsic probabilities arising out of the known or undisputed facts, and facts satisfactorily proved, which party has testified to the truth and which to the falsehood.

The complainant is a well-known business man, of more than 30 years' standing, as generally and thoroughly known here as any man in the United States. There is nothing to throw a doubt upon his character for truth and veracity, except as it arises out of the testimony in this case directly or inferentially contradicting his own. Of the respondent we know much less,—indeed, little beyond her own account of herself; but as to her, also, there is nothing to impeach her character for truth and veracity beyond the testimony in the case contradictory of the testimony given by herself; the character of her testimony; the unusual and unsatisfactory tone and manner in which it was given; and such intrinsic probabilities and improbabilities as arise out of her testimony and the other testimony introduced. Conceding, then, for the purposes of the case, that the parties, at the out-

set, stand upon an equal footing as to character for truth and veracity, their naked statements are equally balanced, and we must determine from the other evidence, and the probabilities arising out of it, on which side is the preponderance.

Under the circumstances, the inquiry naturally suggests itself to the mind: To what extent are these parties contradicted or corroborated upon material matters by the direct testimony of other credible witnesses, testifying with regard to the same material facts? Upon examination of the testimony, I do not find that the complainant, Sharon, has been directly contradicted by other witnesses having positive knowledge of the facts as to any fact material to the case to which he has positively testified; unless upon some points he may be regarded as inferentially contradicted by Mrs. Pleasant, who is as deeply implicated in the conspiracy, if conspiracy there be, as the respondent herself, and, in view of the circumstances disclosed, whose testimony must be taken with a considerable degree of caution. On the other hand, the respondent has been directly contradicted, on many material points, as to her acts performed and declarations made from 1880 to 1883, wholly inconsistent with the idea that at those times she considered herself to be the wife of complainant. Such contradictions in many important matters, which I shall not take time to enumerate, are found in the testimony of Mrs. Bacon, Mrs. Morgan, Mrs. Kenyon, Mrs. Millett, and Mrs. Mary Brackett, and as to an important matter, in some aspects of the case,—the time of the opening of Martha Wilson's restaurant,—by several gentlemen of unimpeachable character, supported by contemporaneous entries in their account-books. Respondent, it is true, now sneers at all these female witnesses, and indulges in very uncomplimentary remarks concerning them; but they were at one time manifestly, from her own testimony, more or less intimate with her, and to a considerable extent enjoyed her confidence and society, and to that extent, by her past conduct and acts before the litigation was entered upon, they have her own indorsement. There is nothing else other than her contradictions, and their association and connection with this case, disclosed in the evidence, to discredit, generally, their testimony. The fact of so many witnesses among her former associates—*ante litem motam*—testifying directly contrary to respondent upon material matters, about which they cannot well be mistaken, tends strongly to impeach her credibility, and is worthy of serious consideration in deciding the great point in issue, thus otherwise left so equally balanced by the testimony of the two parties themselves. Besides, the whole tone and manner of testifying by respondent, and the inherent character of the testimony given by her, is extremely unsatisfactory. The tendency is not by any means to inspire confidence.

The complainant admits that he has known respondent from August, 1880, and respondent says that she first met complainant in the spring of 1880, but she cannot fix the date; and, between that time

and August 25th, that she had several interviews with him, but cannot tell how many, one of which was at the Baldwin Hotel, shortly before she went to the Galindo Hotel, at Oakland. The interviews, other than at the Baldwin, were either on the street, near the Bank of California, or at complainant's office, over the Bank of California. She cannot tell whether the interviews were once a month or oftener. As near as it can be made out from her testimony, she did not go to the Galindo until some two or three weeks or more after the incident of taking laudanum at the office of a prominent attorney, which was on May 10, 1880; and she does not know whether any one of the interviews with complainant took place before the happening of that incident. I think, therefore, it may be assumed that the acquaintance commenced, and all the interviews occurred, after May 10th, and consequently that there were but very few of them between that date and August 25th. As I understand her testimony, she does not positively identify more than two visits to complainant's office, which were had at his suggestion. At one of them she says that he proposed to give her \$1,000 a month and the use of a horse, if she would consent to be his mistress. She so understood the proposition, and declined it, saying he had mistaken her character, and that he could obtain other women to serve in that capacity for a much smaller sum. She says that he then proposed marriage, which she accepted, and came to meet him again, by appointment, on August 25th; that she arrived a little late, and found complainant somewhat excited and nervous on that account, as he was going to Virginia City, Nevada, on that afternoon; that he had a table with paper, pens, and ink on it, and directed her to sit down and write as he dictated, which she did, and then wrote, at his dictation, the instrument in question, signing where he directed; that he had a small book in his hand at the time, which he consulted, and seemed to dictate from it, and a number of large books that looked like ordinary law books, from which he read passages showing that such marriages were lawful, and cases in which they had been sustained, and in which the wife had obtained property as such; that they stopped and talked, discussing matters from time to time as they proceeded; that it was all written at one sitting, and no part rewritten; that they were engaged in it, it might be an hour, an hour and a half, or perhaps two hours; that when it was finished complainant came round beside her, asked her if she was satisfied with it, and signed it, adding the words, "Nevada, Aug. 25, 1880;" that she was surprised at that mode of marriage, and so expressed herself, and said, "That can't be our marriage certificate, senator;" that complainant said that it was all right, and, as he was going away that afternoon, directed her to take it home and copy it all over nicely, and, when he returned, he would sign the new copy for her, and the rough one then signed he would keep for himself; that she then left with the document, and returned to the Galindo Hotel, at Oakland, and she supposes he went to Virginia. At

all events, she never saw anything more of him till some time after September 9th. This is her account of the courtship and marriage, which is positively denied by complainant. There is no evidence of any kind that she ever made a neat copy for them to execute on complainant's return, as she was directed to do, or that any copy was ever executed for complainant, or that the matter of making the neat copy was ever afterwards alluded to between them. The books alluded to were doubtless intended to be the pocket edition of the California Civil Code and some volumes of reports. But Mr. Dobinson, the private secretary of complainant, and who for years occupied Sharon's rooms in that capacity, and who was perfectly familiar with all furniture and fittings up, testifies that no such books as described were kept in the office; that he would have seen them had they been there; and that he did not see any such there at that or any other time. They could hardly have been in the office without his knowledge, and this affords a strong presumption that no such books were there, and, to that extent, is in conflict with the respondent's testimony on this point, and supports the testimony of complainant.

I think it must be admitted that there is a strong intrinsic improbability that such an extraordinary contract, upon so short, casual, and exceptional an acquaintance, without consultation with or knowledge of her brother and numerous other relatives and friends, should be clandestinely entered into in such an extraordinary manner, by an honorable and virtuous young lady of 27, so intelligent and shrewd, and so well acquainted with the world, as the respondent has demonstrated herself to be. And it is no less intrinsically improbable that a man of complainant's experience, wealth, and position should enter into so strange a contract, with an honest purpose of honorable marriage, while there was no better reason for departing from the ordinary course of matrimonial alliances than has yet been suggested; and it seems, also, still more improbable that a man of complainant's knowledge of the world and shrewdness would, at his age, place himself in so embarrassing a position,—put his wealth and position at such hazard,—from the basest of motives, and with a deliberate purpose, so infamous and shocking to the moral sense, of deceiving respondent and accomplishing her ruin. A motive and purpose so infamous ought not to be attributed to a man hitherto holding a respectable position in society—such a position as would lead an intelligent lady of good connections and social position, knowing his standing, to marry him—against his solemn oath to the contrary, except upon testimony reasonably satisfactory to the mind; certainly not upon the unsupported testimony of an unusually intelligent and experienced party, capable of entering into a secret arrangement so extraordinary, upon so slight an acquaintance of exceptional character, without consulting with or the knowledge of her numerous relations and friends, including a brother, who had theretofore been to her all that a brother could be to a sister, and

who were readily accessible, and in habits of daily intercourse with her,—that brother, at the time, living in the same house with her, and serving as her protector. Again, according to respondent's own account, this interview and transaction having taken place somewhere from noon and afterwards, on August 25th, at its conclusion the parties separated, she going to her residence at the Galindo Hotel, in Oakland, and complainant, as she supposes, to Virginia City, Nevada, leaving by the 3:30 p. m. overland train, the only means at that time of travel between San Francisco and Virginia.

Respondent remained at the Galindo Hotel until it was destroyed by fire, on or about September 9th, when she returned to the Baldwin Hotel, in San Francisco, and remained till the latter part of September. The complainant remained in Virginia until some time after the destruction of the Galindo Hotel, in September, and returned to San Francisco between the date of that event and September 25th, the date not now being definitely fixed. He called on respondent, she says, at the Baldwin, before September 25th, but she cannot say how long before. It was probably but a short time before September 25th, for on that day complainant was active and urgent for an interview, he having on that day written her several notes, some of them in evidence,—I think four in all,—seeking an interview, addressed at the heading, "*My Dear Miss Hill.*" And immediately after that she removed to the Grand Hotel without even consulting with her brother, *who was with her at the Baldwin*, or informing him of her contemplated movement. Upon learning of the change, however, he immediately followed her to the Grand, and for her protection took up his residence at that house, thereby manifesting the deep interest he felt in her welfare. During the whole month, from the date of the alleged marriage contract, August 25th, to September 25th, there was no communication by word, letter, or telegraph between complainant and respondent, except the single call by complainant at the Baldwin at some time after his return from Virginia City, and before September 25th, the date of which is not fixed. Respondent did not even inform complainant of the burning of her residence, and her consequent removal. She did not intimate to her newly-acquired husband where she could be found on his return from Virginia City, and he was compelled to send his Chinese servant to Oakland and elsewhere to learn of her whereabouts; so that it is probable that the meeting at the Baldwin was not very long prior to September 25th, when complainant became so active and urgent for an interview. Thus a month or nearly so intervened between the entering into this extraordinary marriage contract and any further communication, or effort to communicate, between them. It does not appear that prior to complainant's return from Virginia City there had been any consummation of the marriage by marital intercourse.

The respondent, according to her own account, did not take sufficient interest in her newly-acquired husband to communicate with him, or

to inform him of her misfortune in being burned out, and compelled to remove, and where he could find her on his return; and gave as a reason for her neglect that she did not conceive it necessary for wives to run after their husbands, and that she supposed he would find her, if he wanted to, on his return from Virginia City. There was a daily mail, and at all times telegraphic communication, between San Francisco and Oakland and Virginia City, and yet nothing passed between these newly-married parties during nearly or quite the whole month usually designated as the "honey-moon," and under circumstances wherein we should certainly expect some written or other communication. These first *private* notes of the complainant after the alleged marriage were addressed, in the heading, "My Dear Miss Hill," and only intimated the desire for an interview for her benefit, saying: "Something I want to tell you about of interest to yourself." There is nothing in the notes breathing the spirit of a husband newly married, or even of half a century's standing. To my mind the conduct attributed to both parties by the respondent, during the month following the alleged marriage, is intrinsically improbable, had there been a marriage contract as claimed. I cannot reconcile such a course of conduct with my observation and experience of the course of human action, and the influence and operations of human affections. It seems incredible. It is, of course, possible that two parties can be so constituted that they could make such a contract, and conduct themselves under the circumstances and in the manner indicated during the month following marriage; but it is highly improbable, not to say utterly incredible, even when considered by itself, unaffected by other collateral facts; and such improbability is to be considered, and it should receive its due weight in connection with the other facts developed in the case.

We now come to the period from September 25, 1880, to November, 1881, while respondent resided at the Grand Hotel, and while the relations of the parties were most intimate, harmonious, and cordial; and afterwards, from the time of respondent's expulsion from the hotel, in December, 1881, until September 8, 1883, when complainant was arrested on a charge of adultery upon the complaint of Neilson, and at the instigation of respondent, *by means of which publicity was first given* to respondent's claim of wifehood. My associate has fully discussed the evidence and facts relating to this period, and I shall not go into particulars, but only state some facts appearing in the evidence, with a view of drawing the proper inference therefrom.

One distinguishing fact is that the alleged marriage was kept secret, not only during the two years provided for in the contract, but for a year or more afterwards, as it was never made public until the time of complainant's arrest, September 8, 1883. Secrecy is always a badge of suspicion and fraud, and especially so in matters of interest to society, and which public policy and the laws of well-regulated society require to have general publicity. Withholding knowledge of the

relations of the parties from the public, and especially from those who have a right to be informed upon the point, and clandestine sexual intercourse, are strongly indicative of meretricious, and not marital, relations. And to this effect are all the authorities upon the subject. The marriage and intercourse, in this instance, were kept profoundly secret from the public, and, so far as possible, from respondent's brother and other near relatives; and, so far as we know, only revealed, if at all, to a few who, to say the least, in view of the known facts, are of questionable standing, and who occupy an unenviable relation to the case,—parties to whom such a revelation was not likely to be made in a case where a contract in good faith required secrecy, and where it was studiously concealed from those having a right to know, and who would be quite as likely to keep a secret, if desirable to do it. Those relatives could, certainly, have had no motive to defeat the election of complainant to the senate after he had become so nearly allied to them by marriage. There has been introduced in evidence a number of letters and brief notes from complainant, addressed to respondent while she lived at the Grand Hotel, from September, 1880, to November, 1881, and during the year when the relations between the parties were the most intimate and cordial,—while respondent claims that they were happily, though secretly, cohabiting together as husband and wife. Of all these letters thus introduced, and if any were omitted it must be presumed that respondent would have offered all those favorable to her case, five appear to be addressed "My Dear Wife." These are positively declared by complainant to be forged and spurious, at least so far as the word "wife" is concerned. But, waiving a discussion of that point in this opinion, it having been covered by my associate, not one of these letters, aside from the word "wife," contains a word that suggests the relation of marriage, or breathes the spirit a husband would be expected to manifest in a correspondence, however cursory, casual, or unimportant, with his wife. That word is singularly inconsistent with the tone and matter of the rest of these letters.

No satisfactorily authenticated word or act on the part of complainant, indicating the relation of husband and wife, or inconsistent with meretricious relations, during the whole three years from August 25, 1880, to September 8, 1883, appears in the evidence, or supported by any direct evidence, other than that of the respondent herself. On the contrary, the letters all breathe a different spirit,—sometimes jo-cose, sometimes all business, and all, except the so-called "Dear Wife" letters, are addressed "My Dear Miss Hill," "My Dear Allie," or "My Dear A." The letters of earliest date—those written in the ardor of the waning honey-moon—only rise to the pitch of "My Dear Miss Hill." But these letters are fully discussed by my associate. I only refer to them for the purpose of drawing an inference. There does not appear to be any good reason why on one day complainant should address his wife "My Dear Miss Hill," and on another day,

"My Dear Wife;" or why, in their secret correspondence, intended for no other eyes, a husband should not always recognize his wife as wife. If he could trust her with *some such letters, and with the keeping of the marriage contract, why not with more?* But during all this period these parties were dealing with each other in money matters, even in small amounts, *at arms-length*. As early as December 5, 1880, but little over two months after going to the Grand, there was a stock transaction, wherein respondent drew a memorandum, which complainant signed, acknowledging that he held 100 shares of Belcher for "*Miss Hill, at \$200 per share, to be paid for on delivery of the stock.*"<sup>1</sup> This was a private transaction between them, unknown to anybody, and *requiring no mask*. Why this particularity and care in carrying on and concealing under false names a business transaction between husband and wife? So, also, several of the notes from complainant to respondent, introduced in evidence, relate to moneys and accounts between the parties, which were nicely calculated and balanced to a cent, on the apparent basis of \$500 per month, the amount which respondent testifies her husband was paying her. This was not merely pin-money, but funds out of which the wife of a man alleged by respondent to be worth many millions of dollars, with an income of from \$30,000 to \$100,000 per month, was to pay all her expenses, hotel bills, clothing, everything, and out of which she says she also purchased many articles of apparel for her husband, and the account regularly balanced and settled, as though they were dealings between utter strangers.

Yet respondent was offered, according to her own testimony, double the amount to take the position of mistress, she being regarded as twice as valuable in that capacity as in the capacity of wife. So, on November 7, 1881, the complainant paid the respondent \$7,500 in cash, and notes payable to the order of "*Miss Hill,*" the balance of which has been recovered by respondent against complainant in a state court since the commencement of this suit. This the respondent claims to have been paid in settlement of a prior money demand. Complainant denied it, and he accounted for it in that suit on an entirely different theory. But these facts show the course of dealings in money matters between these parties at the very time when their marriage relations, if any such existed, were most harmonious and affectionate; while there *was no occasion between them for masking*; where no one else had occasion to know anything about the transactions; and even, though private, they were dealings, ostensibly, if not in fact, between these parties in the names and character

<sup>1</sup> In the transcript of the short-hand notes of testimony reported by the master the price appears \$200, there being no point between the 2 and the ciphers. This must be an inadvertent omission, for it is a matter of public history and notoriety that, at that date, the value of Belcher stock was, in fact, only about two dollars per share, as a reference to the official records of the San Francisco Stock and Exchange Board, and the daily published reports of sales, will show. But I take the price as I find it in the record.



of William Sharon and S. A. Hill, and not in the names of Mr. and Mrs. Sharon, in the character of husband and wife. They were, ostensibly, dealings at "arms-length," in money matters, sometimes of small amounts, between strangers. This is certainly not the ordinary course of transactions between husband and wife, brought up and educated in this country, imbued with American ideas; and, in view of our laws in relation to marriage, the legal *status* of marital property rights and marital and domestic polity, we naturally look for some recognition of the relation of wifehood from the husband in private transactions, correspondence, and intercourse—domestic, money, and otherwise—between husband and wife, other than the very few instances of the use of the word "wife" in the address of casual letters. We find none on the part of complainant in the relations between him and respondent, so far as they are disclosed to view,—not one instance.

Turning from the conduct of the complainant to that of the respondent during all the time from August 25, 1880, till about a year after the time for secrecy under the clause in the contract had expired, *we find it equally barren of any well-authenticated act or word of respondent, public or private, in complainant's presence, or in addressing him by letter, indicating that she during that period, at any time, regarded herself as the wife of complainant.* No witness ever heard her address complainant as husband, or any language indicating the existence of that relationship. We have a number of her letters-addressed to complainant during that time,—private letters, intended for no eye but his,—and he alone was interested in keeping the secret, and could certainly be trusted with an endearing, wife-like letter,—be trusted with the keeping of his own secret,—but none containing the word "husband," or its equivalent, or any reference to matters between husband and wife, which either would desire, for that reason, not to have brought to the knowledge of others. All of these letters are addressed "My Dear Mr. Sharon," "My Dear Senator," or "My Dear Sen.,"—not one "My Dear Husband." And there is not a line or word in any of them that indicates any idea upon respondent's part that she was the wife of the party to whom they were addressed. There are appeals of the most passionate and pathetic character to his sense of justice, to his generosity, to his manhood, but not one in the character of wife,—not one addressed to him in the character of husband. But my associate has fully discussed these letters, and I need not dwell upon them further than to draw the natural inference, and to say that they are, in my judgment, wholly inconsistent with the idea that, at the time they were written, she thought or supposed she was the wife of complainant. It is inconceivable to me that a woman of the spirit and temper everywhere displayed by respondent, conscious of honor and wifehood, under the circumstances giving birth to some of these letters, could have written them to her husband without reminding him, at least, of the sacred tie binding them together.

Surely, to a man susceptible to the influences sought to be brought to bear upon him, an appeal to his honor, generosity, and manhood would not be less effective coming from a wife, in the character of a wife, than from a mistress, in her character of mistress. This failure to appeal to complainant as husband, to address him as husband, and to claim the rights of a wife, in these *private* letters, written under the distressing circumstances under which respondent found herself, is inexplicable upon any theory that she at that time supposed she was his wife. The claim that she acted under the advice of the aged colored woman, Mrs. Pleasant, is incredible and unsatisfactory. All her womanly instincts, and her resolute and dominating spirit, in which she is by no means deficient, would have rebelled against such a submissive and pusillanimous course.

Again, she states that on one occasion she concealed herself behind a bureau in her husband's bedroom, and remained there while he and another woman occupied the bed together, and that she was greatly amused at what she witnessed. Is it credible that a high-spirited and passionate woman, as respondent claims to be, and as she has on various occasions shown herself in fact to be, conscious that she was a scorned and grossly injured wife, could quietly witness such an exasperating act on the part of her husband, and tamely submit, and that the incident would greatly amuse her? So, on another occasion, according to her own testimony, she concealed a young girl of 18 behind the same bureau, in order that she might hear her husband call her wife while she and her husband went to bed together. What need of taking such means to satisfy Mrs. Pleasant, or anybody else, of her being the wife of complainant, if she at that time had the evidence of the fact in a genuine written contract, supported by the so-called "Dear Wife" letters, then in her control? Are these the acts of a person conscious of being the wife of the party under such espionage? But what was said on that occasion, in those moments of dalliance, is not in evidence, and we do not know that she, even then, drew from complainant's lips the coveted appellation, "wife," under circumstances where the most endearing terms were likely to be used.

So far as is shown by the evidence, therefore, there is no act or declaration, written or spoken, in the respondent's treatment of complainant during these three years, indicating that she supposed herself to be his wife, or that is not more consistent with the idea that those relations were meretricious rather than marital. The fact that she used complainant's carriage, as she says she did, is cited as evidence of treating her as a wife. But if there be any force in this, it is broken by the further fact, stated by herself, that complainant's mistresses have ever since been accustomed to freely use the same carriage, and be driven by the same coachman, in the same manner. Complainant's admitted mistresses, therefore, seem to have been treated alike, and put upon the same footing, in this particular, with

respondent herself. But I need not dwell on points so fully discussed by my associate. Is it too much to say that the whole course of conduct towards respondent, and on the part of respondent towards complainant, during those three eventful years, is in the highest degree improbable, had they been husband and wife? Is it possible that a husband and wife, cohabiting harmoniously, could so conduct themselves towards each other, and that during the first year of their married life?

There is strong evidence on the face of the alleged contract itself that it was written over the name of complainant after the signature had been written, and that parts of it, at least, were written after the paper was folded, and the signature before folding, showing that the signature must have been first written. Without enumerating the points, or discussing again the particulars pointed out by my associate leading to that conclusion, there is enough in the appearance to render it, in a very high degree, probable, when considered by *itself* alone, without reference to the testimony bearing upon other points, that such is the fact. So, also, upon comparing the signature with hundreds of signatures of complainant written from 1875 to 1883, conceded to be genuine, and the testimony of experts *pro* and *con*, it appears to be a better signature than any other of complainant's in evidence. It is smoother, more flowing, regular, artistic, and less cramped than the others admitted to be complainant's. There is not another in all the genuine signatures in evidence that contains all the distinguishing characteristics of the disputed signature. So the fact appears to me to be, after a careful comparison of the disputed signature with all others in evidence, in the light of expert testimony, and even without such light, some of the signatures having been enlarged by the microscope and photographic process, in order to show the prevailing characteristics more distinctly.

Several paying tellers in banks, including the Bank of California, who had paid hundreds and probably thousands of complainant's checks, and others long in his employ, and having the best opportunity to become familiar with his signature, except his former employe, Cushman; also a number of the most skillful experts,—testify that the disputed signature in this case is not the genuine signature of complainant, Sharon. There are others besides Cushman, of no special standing as experts, having less reason to be acquainted with complainant's handwriting, and Gumpel, who is a competent expert, who testify that they believe it to be genuine. To my eye, although I do not profess to be an expert, after a long and thorough examination and careful comparison of the numerous signatures in evidence claimed to most nearly resemble the one disputed,—there are over 3,000 in evidence,—in the light of all the expert testimony, it does not appear to be the genuine signature of complainant. There is one remarkable fact that attracts attention: There are several examples of signatures written by the expert Gumpel, at different times, at the

request of different parties, professedly in imitation of complainant's signature, and written from memory, without any signature before him. The signatures thus written, as they were written, and copies of them enlarged under the microscope and by photographic process, are in evidence; and to my eye, after a careful, studious comparison, there is not one of them written by Gumpel that is not more like the disputed signature than any one of all the numerous admittedly genuine signatures of complainant. Every one of those written by Gumpel contains all of the several peculiar and striking characteristics of the disputed signature, while not one of the genuine signatures of Sharon does. Some of Sharon's signatures contain one, and some another, of the peculiar characteristics of the disputed one; but no one contains all, or nearly all, of those characteristics, as Gumpel's do. This striking resemblance between the imitations of Gumpel and the disputed signature may result from the fact, if it be a fact,—but whether it be a fact or not we do not know,—that Gumpel took the disputed signature, assuming it to be genuine, as his exemplar, and practiced his imitations from that. If this was done, it would intelligently account for the similarity. In that case, however, it shows conclusively that Gumpel at the time fully appreciated all the peculiar characteristics of the disputed signature, and incorporated them into his imitations. That the peculiarities are found, both in the imitations by Gumpel and in the disputed signature, it seems to me, when pointed out, if not before, must be clearly apparent to any tolerably correct and appreciative eye.

The document, it is conceded, was written by respondent, and is alleged by her to have been written at one sitting, no part having been written over, and with interruptions at various points by conversation,—discussing the points as they rose during the writing,—the time occupied being about an hour and a half, or perhaps two hours. It was manifestly written with elaborate care in its mechanical execution. It is by far the best and most artistic specimen of respondent's penmanship exhibited in evidence. Not a word had to be erased, added to, corrected, or rewritten, except, in many instances, to shade more heavily, and apparently with different ink. I think the experience of every one familiar with such work will suggest that it is highly improbable that one could dictate from a book, and another, not accustomed to writing from dictation, sit down and write, so extraordinary a document of such length, while carrying on a conversation discussing the points, legal and otherwise, arising as they went along, without a single mistake requiring correction; especially so, when the last four lines are condensed into a smaller space by omitting several words found in the other corresponding parts of the contract, requiring, to some extent, a reconstruction of the sentences, and also by contracting others, as by using the character "&" for the word "and," in order, apparently, to accommodate the matter to be inserted to the available space; and neither the party

dictating nor the party writing would be likely to know in advance how much it was necessary to contract and condense. If this contract was written in the manner and under the circumstances stated, I think it must be conceded that it is a feat of accurate work that must attract attention,—a very extraordinary performance.

The ink of the signature appears to be different from the ink in which the contract is written, while there seem to be two kinds of ink in the contract, making three in all. According to Dobinson's testimony, but one kind of ink was in the office, other than copying-ink and red ink; and, according to Piper, the ink was not of the kind used in the office; and the inference arises that it is highly improbable that the instrument could have been written in complainant's office, or in the manner as stated by respondent. Taking the document itself, as it appears upon its face, comparing the signature with the numerous genuine signatures of complainant in evidence, in the light of the expert testimony, and of the testimony of respondent, as to the circumstances and mode of its preparation and execution, and the positive testimony of complainant, unequivocally denying the execution of the contract, and considering all the testimony directly bearing upon this point, without reference to collateral testimony on other points in the case, and I think, to any candid, unprejudiced mind, accustomed to consider evidence, and able to appreciate the relation of one set of facts to another, it will appear to be in the highest degree improbable that this signature to the alleged marriage contract is the genuine signature of the complainant; and, whether the signature be genuine or not, still more improbable that it was subscribed to the alleged contract after it was written. It further seems highly improbable that respondent should have confided so important a secret as the marriage contract to such persons as the two colored women, Mrs. Pleasant and Martha Wilson, to Vesta Snow, and Nellie Brackett, and have concealed it from her brother, uncle, aunt, and other much more reputable friends, having a far greater interest in her welfare. It is also highly improbable that her counsel would have failed to call her friends, and, at least, offer to show their knowledge of the contract, as a part of the *res gestæ*, had it been exhibited to them, or had any knowledge of its existence ever been brought to their notice. Their absence from the witness-stand, and from any sort of connection with this trial, is extremely significant. Counsel for respondent were not at all backward in offering, and vehemently pressing upon the attention of the court, any testimony supposed to be favorable to their client's cause. This failure by her to produce the contract for the inspection of respondent's friends, as a vindication of her conduct, which caused them great uneasiness, raises a violent presumption that it was not at the time in existence, and gives rise to a further strong improbability that the contract is genuine.

The discussion of the "Dear Wife" letters I shall leave wholly to my associate.

While section 75 authorizes the making of a "declaration of marriage" substantially in the form of the one in question, section 77 makes the positive additional provision that "declarations of marriage must be *acknowledged and recorded* in like manner as grants of real property." There is no exception. The declaration in question is neither acknowledged nor recorded, and in this important particular fails to conform to the statute. If the parties had the Code before them when this contract was drawn up, as stated, this provision, being on the same page, could not have escaped attention. It provides certain means of proof which public policy demands in matters so important to the interests of society. There surely could be no good reason for not having it acknowledged, even if it was not desirable to record it. There would then have been valid proof on its face of its genuineness. The fact that the declaration is neither acknowledged nor recorded, as is expressly required by the very statute under which it purports to have been executed, raises an implication against its genuineness, and affords another improbability that it was drawn and executed in the manner alleged by respondent. Surely, when the statute itself provides for, and in the most positive, mandatory terms requires, the evidence of the genuineness of the instrument indicated, it is not too much for the court, in the absence of both such acknowledgment and record, to insist that the other evidence of the genuineness of so extraordinary a contract of marriage should be of the most indubitable and satisfactory character.

To recapitulate the results thus briefly suggested by the evidence more fully elucidated by my associate: We start with a direct irreconcilable contradiction between the complainant and respondent as to the execution of the alleged marriage contract, one affirming and the other denying its execution, and the point to be determined is, which is right? Conceding the parties *prima facie* to stand upon an equal footing as to character for truth and veracity, the question of veracity between them must be determined from the other evidence in the case. There is no other direct evidence upon the principal fact in issue, and we cannot know, absolutely, where the truth lies. The scale must therefore be turned by the intrinsic probabilities arising out of the known facts, considered in their relations to all the other evidence in the case, and all collateral facts disclosed, from which the truth may be inferred.

We have, then, these several enumerated improbabilities, contradictions, and other circumstances fairly suggested by the evidence:

(1) The improbability that complainant, a man of experience, of known intelligence, reared with ideas such as prevail in this country upon the subject, should enter into so extraordinary a contract, in the extraordinary way indicated, with honorable intentions, without a stronger motive than any suggested for departing from the ordinary course in entering into matrimonial alliances; and the greater improbability that he should do it with the basest and most infamous

purpose of deceiving, and thereby ruining, the respondent. Such infamous acts should not be attributed to him against his unqualified, positive denial, except upon evidence clearly satisfactory.

(2) The improbability that an honorable and virtuous woman, of the respondent's intelligence, spirit, and experience in the ways of the world, in easy pecuniary circumstances, as she claimed to be, of respectable connections and good social position, upon so short an acquaintance of so exceptional a character, without consulting her brother,—one who manifested so much interest in her welfare,—or other near relatives and friends, should enter clandestinely into so extraordinary a contract, in so extraordinary a manner.

(3) Had there been executed a contract of the character alleged, in the extraordinary manner stated, the improbability that both or either of the parties would, or even could, have conducted themselves with respect to each other in the way we know they did during the month, or nearly the whole month, following the execution of the contract,—a course of conduct wholly at variance with our experience of human action, and the influence and operation of human affections and human passions.

(4) The improbability that respondent would fail to make her marriage contract, if any there were, public for two years after its repudiation by complainant, who, having violated and repudiated the whole contract himself, could no longer expect respondent to comply with its requirements; and the further great improbability that after her expulsion from the Grand Hotel, and for a year after the time prescribed for secrecy had expired, she would neglect to make the contract public, and claim her rights under it; especially so, where the ignominious position in which the respondent was placed called loudly for publicity; and the still further improbability that a proud-spirited and resolute woman, like respondent, would quietly submit and suffer in silence, under the circumstances of contumely in which she was placed.

(5) The improbability that the private correspondence of a husband with his wife, intended for no eye but her own, should generally be addressed, inside, to her by her maiden name, and in no instance manifest any of the sentiments which would be expected in letters from a husband to his wife, and, in the few instances in which he is claimed to have addressed her as "My Dear Wife," the word "wife" should be the only one in the letter indicative of that relation, and be inconsistent in tone and matter with every other part of the letter.

(6) The improbability that, during all the three years next succeeding the date of the alleged contract, there should be no letter addressed by respondent to complainant, and no authentic instance of a verbal communication between them wherein respondent should address complainant as husband; no instance where there would be some claim or intimation that she considered herself as the wife of

complainant, or in which some sentiment or thought should be expressed, from which it can be inferred that she entertained the idea of wifehood, while a number of letters are shown—in fact, all in evidence—which, in matter and form, are wholly inconsistent with the idea that she considered herself the wife of complainant.

(7) The improbability that during the time of a cordial and harmonious cohabitation as husband and wife, if such there was, the parties should at all times deal with each other, in money matters, at arms-length, and account together from time to time, balancing to a cent on the apparent basis of \$500 a month allowance, and that out of this pitifully small sum, comparatively speaking, the wife of a man of so great wealth should be required to pay all her expenses, rent of rooms to live in, hotel bills, clothing, ornaments, and other personal expenses incident to a lady in good society, when that husband had, before marriage, offered to respondent double the allowance to live with him in another capacity, of less respectable character.

(8) The improbability that respondent's important and vital secret should be confided to such parties as Mrs Pleasant, Martha Wilson, and Vesta Snow, whose positions, in the most favorable aspects in which they can be viewed in connection with the circumstances developed in the testimony, are, at least, equivocal, and have been concealed from her brother, who had theretofore been to her all that a brother could be to a sister, and who remonstrated with her against her association with complainant; also from her uncle, who had manifested so great an interest in her as to threaten physical punishment to complainant; from her aunt and her husband, and respondent's other relations and friends, and under the circumstances of ignominy in which she was placed, if revealed to them, that they, or she herself, should have concealed it so long from the public.

(9) The great probability, from the appearance of the alleged contract, and the intrinsic evidence disclosed on its face, that it was written after the writing of the signature, and after the paper had been folded; and the further great probability appearing from a comparison of the signatures to the alleged contract with numerous genuine signatures of complainant, and from a consideration of all the testimony bearing upon the point that the signature was not, in fact, written by complainant.

(10) The great probability that respondent's veracity cannot be relied on, from the fact that respondent is substantially contradicted by Dobinson as to there being books of the kind she mentions at the time of the alleged execution of the marriage contract in the office of complainant, by other credible witnesses as to the date of the opening of Martha Wilson's restaurant, and that she is directly contradicted as to the numerous acts performed and declarations made by her in 1880, 1881, and 1882, about which neither can be mistaken, wholly inconsistent with the idea that at that time she supposed she was the wife of complainant, by Mrs. Morgan, Mrs. Millett, Mrs.



Kenyon, Mrs. Bacon, and Mrs. Brackett, thereby discrediting her testimony on material points; also, the improbability arising out of the unsatisfactory character of the testimony given by respondent, and the unsatisfactory tone and manner in which it was given.

(11) The improbability as to its genuineness arising from the fact that the alleged declaration of marriage was not "acknowledged and recorded in like manner as grants of real property," as is expressly required that it should be by section 77 of the Civil Code.

(12) Secrecy is always, as we have seen, and especially in matters which the good of society and public policy require to be made public, a badge of suspicion and fraud. The secret acts of the parties in this case are *indicia* of meretricious, and not marital, relations, and give rise to a further probability that there was no genuine marriage contract.

Without going over the particulars of the evidence so ably and satisfactorily discussed by my associate, I find these intrinsic improbabilities, probabilities, and these other weighty considerations disclosed in the case, to be opposed to the testimony of respondent; and I am wholly unable, on the other hand, to find any sufficient deductions from the testimony in the case to counterbalance them. In my judgment, the weight of the evidence, even as presented in the case, without an inspection by the court of the original documents, largely preponderates in favor of the complainant, and satisfactorily establishes the forgery and the fraudulent character of the instrument in question.

It would have been far more satisfactory to the court if the original documents themselves had been introduced in evidence, instead of mere photographic copies, or if the court could have been permitted to inspect the originals; but this could not be done without compulsion, or upon such conditions as respondent and her counsel themselves saw fit to prescribe, and to which the court could not submit. We have done the best we could, in view of the disadvantages under which we labored, in this particular, and if the respondent has suffered from a want of inspection of the originals by the court, and nearly all the witnesses,—all except the witness Piper,—it is the result of her own and her counsel's acts. The inference that must be drawn from withholding an inspection is that their production would be injurious to respondent's case, and this inference only makes more certain the correctness of our conclusion, which is sufficiently obvious without its aid.

I am satisfied, after a most laborious and careful consideration of the evidence, that the instrument in question, the so-called "Dear Wife" letter in ink, and the other "Dear Wife" letters, the latter at least as to the word "wife," are not genuine; that they are forged and fraudulent; and that the alleged declaration of marriage set out in the bill ought to be canceled and annulled as a forgery and a fraud.

The analysis of the evidence by my associate is so searching, ex-

haustive, and satisfactory, and his reasoning so convincing, that no further discussion can be desired. I feel that I can add nothing of interest, or that will give additional force, to the argument, and but for the great importance of the case, and the wide-spread public interest manifested in it, I should have remained silent. Without further observations, therefore, I concur in the conclusions on the material points reached, in the line of reasoning by which they are established, and in the decree ordered.

As the case was argued and submitted during the life-time of complainant, who has since deceased, the decree will be entered *nunc pro tunc*, as of September 29, 1885, the date of its submission, and a day prior to the decease of complainant.

---

ANHEUSER-BUSCH BREWING ASS'N v. CLARKE.

(Circuit Court, D. Maryland. January 20, 1886.)

TRADE-MARK—INFRINGEMENT—INJUNCTION.

Where a manufacturer has applied a peculiar and distinctive label to designate his goods, and has so used it that his goods are identified by it, a court of equity will restrain another party from adopting and using one so similar that its use is likely to lead to confusion by purchasers exercising the ordinary degree of caution which purchasers are in the habit of exercising with respect to such goods.

In Equity. On motion for preliminary injunction.

Rowland Cox, for motion.

Wm. Pinkney Whyte, for defendant.

MORRIS, J. The general rule of law applicable to this case is that if a manufacturer has applied a peculiar and distinctive label to designate his goods, and has so used it that his goods are identified by it, a court of equity will restrain another party from adopting and using one so similar that its use is likely to lead to confusion by purchasers exercising the ordinary degree of caution which purchasers are in the habit of exercising with respect to such goods. *McLean v. Fleming*, 96 U. S. 245.

The complainant's affidavits show that the complainant was the first to use for bottled beer a label with a diagonal red band, with the name of the kind of beer appearing in white letters on the red band, and that he has been habitually using this label for two years. The label is a very noticeable and distinctive one by reason of the diagonal red band. The result of the effect upon the eye from seeing a number of bottles is that it is a beer labeled with a diagonal red band, and the more frequently one sees it the more this one effect is deepened. It does appear altogether probable that a consumer who had been used to getting bottles labeled with complainant's label would

more and more rely on the diagonal red band as its distinctive mark, and would be likely to accept the respondent's beer with his diagonal red label on it as supplying what he was in the habit of getting. There is nothing in the differences in the labels calculated to counteract this, and I think it is a strong case of a similarity likely to deceive.

The respondent's statements and explanations of how he came to hit upon this label for his own use are not satisfactory. It appears that it was suggested to him by a bottler in Washington, named Christian Abner, who was a rival of a bottler of complainant's beer, and using complainant's label in that same city, named Edward Abner. Nothing is shown by the affidavits to repel the suspicion which naturally arises that the subsequent adoption of such a very similar label by one of the two rivals in the same city could not be accidental, but must have been for the purpose of confusion.

On the case, as shown by the affidavits, I think the complainant is entitled to the injunction as prayed.

---

RAILWAY REGISTER MANUF'G Co. v. NORTH HUDSON Co. R. Co. and others.<sup>1</sup>

(Circuit Court, D. New Jersey. January 13, 1886.)

1. EQUITY PRACTICE—APPLICATION FOR REHEARING—DISCRETION.

An application for a reargument is addressed to the discretion of the court, and the exercise of such discretion is not willful, but is governed by certain well-established principles.

2. SAME—GROUNDS FOR REHEARING.

The grounds on which courts ordinarily grant rehearings are (1) upon allegation that any question decisive of the case, and duly submitted by counsel, has been overlooked by the court; and (2) that the decision is in conflict with an express statute, or with a controlling decision, either overlooked by the court, or to which attention was not drawn, through neglect or inadvertence of counsel.

3. SAME—INSUFFICIENT GROUND FOR REHEARING.

The allegation that one defense was not fully presented at the original hearing is no ground for rehearing.

4. PATENTS FOR INVENTIONS—COMBINATION OF OLD PARTS, WHEN PATENTABLE.

A combination of old elements is patentable, where a new and useful result is produced by their joint action, or an old result in a cheaper or otherwise more advantageous manner.

On Application for Reargument.

*Frost & Coe*, for application.

*Dickerson & Dickerson*, *contra*.

NIXON, J. This is an application for the reargument of the above case, upon the same testimony, and under the same circumstances,

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

under which it has been before argued and decided. The only ground set forth in the petition for the court to open the case, and grant the motion, is that the defense, that "the devices claimed in the complainant's patent did not constitute a patentable invention," was not fully presented on the final hearing. The application for a reargument, it is true, is addressed to the discretion of the court. The exercise of such discretion, however, is not willful, but is governed and determined by certain well-established principles. In *Giant Powder Co. v. California Co.*, 5 Fed. Rep. 197, Mr. Justice FIELD tersely says that a reargument is never granted to allow a rehash of old arguments, and that the proper remedy for errors of the court on points argued in the first hearing is to be sought by appeal when the decree is one which can be reviewed by an appellate tribunal. The present case is one of such character.

The grounds on which courts ordinarily listen to such applications are stated by the court of appeals of New York in *Marine Nat. Bank v. City Nat. Bank*, 59 N. Y. 73. They are (1) upon all allegations that any question decisive of the case, and duly submitted by counsel, has been overlooked by the court; or (2) that the decision is in conflict with an express statute, or with a controlling decision, either overlooked by the court, or to which attention was not drawn, through the neglect or inadvertence of counsel.

Neither of these reasons is shown or alleged to have existed. The counsel for the defendant simply state that one of their defenses was not fully presented. If not, why not? No limitation or constraint was imposed in the argument. It happens that the very ablest counsel are often dissatisfied with their presentation of the most important causes, but that has never been regarded as a satisfactory reason for the court to allow them another opportunity. The solicitors of the defendants, who unite in an affidavit to secure the rehearing, say that "it can be readily shown, on a reargument, that, in view of the state of the art, all the elements of the alleged combinations of the three claims in suit are old, and that there was no new result obtained by their alleged combination; but that the same advantage, alleged by complainant to be brought about by their combination, were old and well known in fare-registers."

This does not quite meet the case. The latest decision of the supreme court on this subject, which has come under my observation, was made in *Stephenson v. Railroad Co.*, 114 U. S. 149; S. C. 5 Sup. Ct. Rep. 777. In the opinion which I filed in this case I quoted what the supreme court there said was the rule in regard to combination claims, where the elements were old, to-wit, that such combinations were patentable, where a new and useful result is produced by their joint action, or *an old result in a cheaper or otherwise more advantageous manner*. Counsel for the defendants were probably misled by the hasty and meager comments which I made upon the quotation, and inferred that I meant to assert that only a new and useful result

would sustain such a patent. The opinion further states, and I ought to have added, that an old result may be sufficient, when it is produced by the combination in a cheaper or otherwise more advantageous manner.

I think the complainant's mechanism does this, and hence a re-argument on the question of novelty would subserve no useful purpose. The application is therefore denied.

---

ROSS v. HELLYER and another.<sup>1</sup>

(Circuit Court, S. D. Iowa, C. D. October, 1885.)

**HOMESTEAD—ABANDONMENT—REMOVING INTO AND VOTING IN ANOTHER COUNTY.**

Removal of the owner of a homestead to another county, and repeatedly voting at elections held in such county, is sufficient evidence to establish an abandonment of the homestead.

**In Equity.**

This is a suit in equity to subject the homestead of the defendants, at Des Moines, Iowa, to the payment of a judgment recovered by the assignor of the complainant in this court, May 22, 1879, for \$4,438.93. The homestead in question was purchased and paid for partly with the proceeds of a former homestead owned by the defendant Hellyer, at Nevada, Story county, Iowa, when the debt on which the judgment was recovered was contracted. It is claimed by the complainant—*First*, that, notwithstanding Hellyer continued to be the owner of the Nevada homestead at that time, it was for the time being abandoned as such, as against this complainant, who, during the abandonment, became his surety in an indemnifying bond.

*P. F. Bartle and S. F. Balliet*, for complainant.

*Gatch, Connor & Weaver*, for defendants.

Love, J. The evidence in this case is convincing to my mind that Robert Hellyer, the defendant, changed his residence from Nevada to Boone without any definite intention of returning to the former place. That he made an actual change of abode from the one place to the other there is no doubt. With what intent or purpose did he make the change? Was it his purpose in going to Boone to make that place his domicile? If it was not, then why did he commit the offense of voting at elections in Boone? The reasoning of counsel for the defendant on this fact is, to my mind, entirely unsatisfactory. Counsel say:

"*First*. As to the conceded fact of Hellyer having voted while living at Boone, it signified one of three things: either that he was a citizen by actual change of domicile, and therefore had the right to vote, or that he errone-

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

ously supposed he had the right to vote without such change, or that he knew his voting to be illegal and criminal. Either the second or third having been the fact would be consistent with the defendants' present claim. Hellyer's own testimony is that, while he did not remember having voted, he did so, if at all, because he supposed actual residence alone gave him the right to vote."

Again, it is said that he may have erroneously supposed he had a right to vote without a change of residence. The court cannot accept this argument as sound. It is manifestly untenable. Ignorance of the law in any man of ordinary intelligence cannot be presumed or assumed. Any man in Iowa must be densely ignorant not to know that he cannot reside in one county and vote in another without committing a public offense. To say nothing of the legal presumption that every man knows the law, it is a matter of common knowledge with our people that the right of suffrage must be exercised in the county in which the citizen has his residence. If Hellyer went to Boone with no intent to make it his residence, but for some mere temporary purpose, regarding Story county at the same time as his place of residence, it seems to me most unreasonable that he could have been ignorant of the fact that in voting in Boone county he was committing a grave public offense. But counsel say:

"Why may we not, if necessary, assume that Hellyer knowingly violated the law in voting at Boone, rather than that both himself and wife falsely testified that their residence there was only temporary?"

As to Hellyer, if we assume that he knowingly committed a crime against the law in voting at Boone, we discredit him as a witness. If he knowingly committed one crime, what warrant have we to say that he would scruple to commit another crime, when his interest would be promoted by the second offense? It would argue almost total oblivion, in the court, of the lessons of common experience, to attach any great importance to the testimony of witnesses given in their own pecuniary interest, in the very teeth of facts and circumstances wholly inconsistent with their testimony. I greatly prefer the evidence of facts to the testimony of parties to the record as to their own intentions, when such testimony is given to put money in their own pockets. Now, if we conclude that it was Hellyer's intention to become a citizen of Boone by actual change of domicile, and therefore that he had a right to vote in Boone county, we ascribe to him conduct consistent with his duty as a citizen. But if we reach the opposite conclusion, namely, that he did not intend to fix his residence in Boone, but to continue it in Story county, and that he therefore had no right to vote in Boone county, we then impute to him a crime of very serious character. Should the court impute to Hellyer a purpose implying guilt rather than innocence? Why should the presumption of a guilty intention prevail against that of an innocent and lawful purpose? Is it a just method of reasoning upon human conduct, to impute to a party unlawful and criminal in-

tentions, when a lawful and innocent purpose is more consistent with his conduct? The law presumes innocence. If Hellyer were on trial for illegal voting, would it not be deemed a harsh and erroneous judgment to reverse the legal presumption, and, in the words of counsel, "assume that Hellyer knowingly violated the law in voting at Boone?" In this case there was an actual change of residence for about three years from one county to another. In connection with this fact, we have the further fact conceded that the party voted repeatedly in the county to which the change was made. If this cannot be taken as sufficient evidence of an actual change of domicile, and of a purpose to make the last-named county the residence of the party, it is difficult to see what evidence would be sufficient to warrant that conclusion.

---

LEHIGH VALLEY COAL CO. v. CITY OF CHICAGO.

(Circuit Court, N. D. Illinois. January 29, 1886.)

**1. MUNICIPAL CORPORATION — STREET IMPROVEMENTS — LIABILITY OF CITY FOR DAMAGES.**

In Illinois where the construction of a public improvement has caused some direct physical disturbance of a right which a party enjoys in connection with his property, which gives it an additional value, and by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally, he has a right of action to recover damages for the injury sustained dependent upon the nature and character of the improvement, and upon the question whether the property of the complaining party has been materially damaged in fact.

**2. SAME—WHAT CONSIDERED BY JURY.**

In determining what has been the effect of the improvement, the property alleged to be injured must be considered as an entirety. If a part be benefited or not injured, and a part be injured, damages cannot be awarded for injury to the part as disconnected from the remainder.

**3. SAME—MEASURE OF DAMAGES.**

In such a case the amount of damages to which the owner is entitled is the difference between the market value of the property before the improvement was made and its market value after the construction of the improvement.

**4. SAME—EVIDENCE—EXPERT TESTIMONY.**

The value of opinions given by experts depends upon the experience and knowledge which they have and evince concerning the matters about which they testify.

**5. SAME—VIEW BY JURY.**

In arriving at a verdict the jury have the right to use and act upon the knowledge they may have acquired from a view permitted by the court of the *locus in quo*.

At Law.

Frederick Ullman, for plaintiff.

E. J. Harkness, for the City.

DYER, J., (*charging jury*.) The merits of this case, gentlemen, lie within rather narrow compass; but, to enable you to arrive at a correct conclusion, the testimony adduced in support of the respective

claims of the parties should have your careful consideration. A verdict one way or the other should not rest upon speculation or conjecture, but upon your convictions as to the facts established by the weight of the evidence.

It is the law in this state that where the construction of a public improvement, like that in question here, has caused some direct physical disturbance of a right which a party enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally, he has a right of action to recover damages for the injury thus sustained. This right of action depends upon the nature and character of the improvement, and upon the question whether the property of the complaining party has been materially damaged in fact. Applying that rule to this case, it follows that if the construction of the Chicago avenue viaduct, although it was an important public improvement, did in fact cause to the plaintiff's property actual damage, over and above any benefits received,—that is, depreciation of market value,—then the city is liable for the amount of such damage.

In considering the case the true question is whether the property was injured by the improvement. If not, then there is no damage, and can be no recovery. If there is, then the recovery must be measured by the extent of the loss. If the property is worth as much after the improvement as it was before, then there is no damage done to the property. If the benefits received from making the improvement are equal to or greater than the loss, then the property is not damaged. There can be no damage to the property without a pecuniary loss. If there is no depreciation in value there is no damage, and if no injury, then there should be no recovery. This is the language of the supreme court of this state on the subject, and establishes the general rule by which we should be guided in disposing of this case. The test is that the alleged injury must rest upon some substantial cause actually impairing the value of the property or its usefulness, and not be the result of taste or fancy merely, because of the proximity of the improvement to the property claimed to be affected by it.

Whether the plaintiff's property was damaged depends upon whether it received such material injury as rendered it less valuable to the owners, or less useful as a whole, than it would have been but for the viaduct having been constructed as it is. It is not the damages to a part of the property, considered separately from the rest, that you are allowed to assess, but the damages, if any, to the property as an entirety by reason of the construction of the viaduct, that are to be taken into consideration. It is inadmissible to treat any portion of the property injured as a distinct and separate parcel from any portion benefited. A partial effect only is not to be considered, but the whole effect; and the effect, not upon any selected part of the prop-



erty, but upon the whole property. It is, of course, admissible to consider the injury, if any, to a part as affecting the whole, or as showing a damage to the whole; but what I mean is that if a part of the property be benefited or not injured, and a part be injured, you have no right to award damages for injury to the part as disconnected from the remainder, or the part benefited or not injured. Following up the application of this principle, if injury only resulted from the viaduct to a certain part of the premises, and if that injury was outweighed by additional benefits to the residue, which enhanced the market value of the property, then it could not be considered that the premises as a whole were damaged by the construction of the viaduct.

In determining the damages, if any have been sustained, and if you come to that question, the inquiry should be confined to the effect of the construction of the viaduct upon the market value of the property, and the purposes for which it was used and designed. Its location and advantages or disadvantages as to situation are proper matters of consideration by the jury. The question is, was its market value depreciated by the construction of the viaduct? And so, the past profits of the business there carried on, and conjectural profits for the future, should not enter into your consideration, because too speculative and uncertain, and therefore not a proper basis upon which to ascertain the market value of the property. Of course many elements of fact may be taken into account as bearing upon the market value,—such as the situation of the property; the uses to which it is put; the character and extent of the business carried on; the facilities for doing the business, and the location of the property as a point commanding trade from various parts of the city, or otherwise. These may all be considered, but with sole reference to market value. In other words, take this property as it was immediately before the viaduct was constructed, with all its surroundings, what was its fair and reasonable market value at that time? Then take it as it was after the viaduct was built, considering everything in relation to its surroundings and situation, and what was its fair market value then? Was the value it had before the viaduct was constructed depreciated by the construction of this work, or were there resulting benefits equaling or exceeding the alleged injury? As I have indicated, particular injury to the business, as such, is not to enter into the measure of damages, nor is the cost of constructing the new or extended roadway into the yard, and of raising the office and scales, as a mere item of expense which the plaintiffs may have had to pay, to be allowed them; but the fact that changes have had to be made, the extent and the effect of those changes, the fact, if it be a fact, that the alleged changes have entailed, and may yet entail, expense upon the plaintiffs, may be taken into consideration by you in connection with the entire situation of the property, its accessibility and usefulness, with all the facts of the case, to the extent that they bear upon

the question of market value. What was the situation of the property before the viaduct was built? How was it situated with reference to Chicago avenue and to the railroad crossings at the junction of Halsted street and Chicago avenue? What was its accessibility? What were its advantages and disadvantages as a piece of business property, taking the whole situation into account, just as it stood before the viaduct was constructed? And then, taking into consideration the same elements of fact, how was the property affected by the building of the viaduct, measuring such effect by a pecuniary standard based upon market value? You have been permitted to view the premises in question and the viaduct, and you have the right to take into account such facts as you learned by viewing the property, as to whether the construction of the viaduct permanently depreciated or increased the market value of the property, or as to whether the alleged benefits equaled the alleged injury. You have the right, in other words, in arriving at a verdict, to use and act upon the knowledge you may have acquired by inspection of the premises.

I have no doubt you fully understand just what the claims of the parties are. The plaintiff contends that, by the construction of this viaduct, certain changes have had to be made in the means employed for carrying on the business in and about the premises; that the storage capacity and handling facilities of the yard have been diminished; that a new roadway has had to be constructed, lengthening the acclivity from the yard to the street; that a flow of water upon the premises has been caused by the construction of the viaduct and the changes in the street, thereby impairing the usefulness of the property and damaging it; that yearly expense has been caused for the purpose of keeping the new roadway in repair; that the accessibility of the property has been interfered with and obstructed; that the facilities for transacting business have been impaired; and that there has been a radical derangement of previously existing conditions,—all of which have caused a material depreciation of the market value of the property. The defendant admits, as I understand, that if we put out of view entirely the alleged compensating advantages resulting from the building of the viaduct over the railroad crossings, at the junction of Halsted street and Chicago avenue, the plaintiff's property sustained injury by the construction of the viaduct, but it denies that the magnitude of the injury was at all such as is claimed by the plaintiff. The claim of the defendant is that the value of this property, and its profitable use before the viaduct was built, was seriously affected by the dangers and delays incident to crossing the railroad tracks at the junction of Halsted street and Chicago avenue; that those tracks constituted an obstruction to travel from the west side of that part of the city, eastward along Chicago avenue, past the plaintiff's property, and thereby diminished that travel; that the construction of the viaduct removed those dangers and that obstruction, and thus afforded facilities of approach and advantages in use, di-

rectly affecting the property, and improving its eligibility as a business location, which more than compensated for any injury inflicted upon it by the presence of the viaduct. Now, between these conflicting claims you must judge, and you must exercise your judgment fairly and impartially, so as to reach a result that shall be just. I have sufficiently stated the rule by which you must be guided in determining the rights of the parties. It is now your duty to apply the rule to the facts, as you find the facts to be.

Testimony has been elicited from a number of witnesses sworn on the part of the plaintiff, which tends to show that the plaintiff's property has been materially injured by the construction of this viaduct, and these witnesses point out to you the grounds of their judgment. They testify to the market value of the property before the viaduct was built, and to its alleged subsequent depreciation, which they attribute to the viaduct, fixing that depreciation upon a pecuniary basis. Witnesses for the defendant differ radically from those for the plaintiff in their conclusions as to the effect of the viaduct upon this property. They give you also their estimates of market value in 1883, and express the opinion that the construction of the viaduct improved the plaintiff's property and that its value was enhanced thereby. You will notice that their opinions turn largely upon the point that increased facilities for passing over the railroad tracks at the junction of Halsted street and Chicago avenue were afforded by the viaduct; that delays were thereby avoided and safety secured, so that this property was benefited more than it was injured. The court will not discuss the testimony on either side. It presents a pure question of fact, which it is your exclusive province to determine.

The value of opinions given by experts depends upon the experience and knowledge which such witnesses have had and evince concerning the matters about which they testify; and it is your duty to carefully weigh and consider the testimony on both sides, and ascertain what the weight of the evidence establishes.

The credibility of the witnesses is a question for you, and you will judge of the value of their testimony by their apparent candor, or want of it, their bias or impartiality, their intelligence, their knowledge of the subject-matter, their experience so far as it may bear upon the reliability of their judgment in such matters, and all the other circumstances of the case.

Where the question involved is as to the market value of real estate, one of the best criterions of value may be found in sales of similar property in the vicinity; and it is proper to take them into consideration, in connection with the testimony of witnesses.

There has been some testimony drawn out on cross-examination of plaintiff's witnesses concerning a coal-yard owned by the plaintiff at or near Harrison street viaduct. The examination on that subject was only permitted, and will only be considered by you, as bearing upon the credibility of the witnesses, and as testing, or perhaps tend-

ing to test, the accuracy of their statements as to the value and usefulness of the property in question.

Now, gentlemen, you will take the case, and determine it as the evidence, when applied in accordance with the instructions of the court, may require. Again, I say to you that the first question is, was the plaintiff's property injured by the construction of this viaduct? If it was, and if the benefits, if any, are not equal to or greater than the injury, then the plaintiff is entitled to recover. If it has not been so injured, or if the benefits directly resulting to the property from the construction of the viaduct, are equal to or in excess of the injury, then the defendant should have your verdict. If you find the plaintiff entitled to recover, you will assess its damages in accordance with the rule the court has stated on the subject. The plaintiff is not, in any event, entitled to damages in excess of the amount laid in the declaration, which is \$50,000, and no greater damages should be allowed than the plaintiff has actually sustained. You understand that the plaintiff was the owner of the property in question before the construction of the viaduct, having acquired it in 1882. The viaduct was begun in November, 1883, and completed in November, 1884, and the approaches on Chicago avenue and Halsted street, together with the iron bridges, are considered as constituting one improvement or piece of work.

---

CAMBRIA IRON CO. v. LACLEDE WIRE & FENCE CO. (TURNER, Intervenor.)<sup>1</sup>

(Circuit Court, E. D. Missouri. February 5, 1886.)

1. CORPORATIONS—LIEN FOR WAGES UNDER SECTION 761, REV. ST. MO.—ATTACHMENT.

The lien of an employe of a corporation, under section 761, Rev. St. Mo., for wages, is superior to that of a general creditor who attaches after such wages fall due.

2. SAME.

An assignment of the claim will pass the lien.

At Law. Demurrer to intervening petition.

The petition states, in substance, that the Laclede Wire & Fence Company is indebted to the petitioner for work and labor done by him, and also for work and labor performed by others who have assigned their claims to him for value, no claim being for more than \$60; that after said indebtedness accrued the above-entitled case was instituted by attachment, and all the available property of the defendant seized; that the property so seized remained in the

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

marshal's hands until judgment was recovered in said suit, and an execution levied upon it; that said property has been sold under said execution; and that before said sale took place the intervenor notified both the Cambria Iron Company and said marshal of his claims. Wherefore the petitioner prays that said marshal be ordered to pay and satisfy the petitioner's demands before satisfying said execution.

*Paul Coste*, for intervenor.

*Taylor & Pollard*, for plaintiff.

TREAT, J. Under the agreed statement of facts there is only one question to be determined, viz., whether the lien of an attachment, after wages earned, cuts off the demand for said wages under section 761, Rev. St. Mo. The obvious purpose of such statute is to make the property of a corporation specially subject to the wages therein named, unless there was, prior to the earning of said wages, a specific lien. A subsequent lien by attachment does not deprive the laborer for wages earned, from priority of right therefor.

Demurrer to intervening petition overruled. Payment ordered to the intervenor of the balance in the hands of the marshal, less the costs of said intervention.

---

*Ex parte* HIBBS.

(District Court, D. Oregon. February 4, 1886.)

1. CRIMINAL LAW—INDICTMENT—JOINDER OF OFFENSES—TRIAL AND PUNISHMENT THEREFOR.

When two or more distinct offenses are joined in one indictment, under section 1024 of the Revised Statutes, or two or more indictments therefor are consolidated, the jury may find the defendant guilty of one charge and not of another, and may find a verdict as to one or more of the charges, and be discharged from the consideration of the remainder, on which the defendant may be thereafter tried as if a jury had not been impaneled in the case; and the defendant may be sentenced to receive the maximum punishment for each offense or charge of which the jury may find him guilty.

2. EXTRADITION—WARRANT OF EXTRADITION—INTERPRETATION OF.

A warrant of extradition allowed by the Dominion government, under the tenth article of the treaty of 1842 with Great Britain, recited that the party was accused of the crime of forgery, and had been committed for extradition thereon, without saying what forgery. *Held*, that resort might be had to the proceedings before the committing magistrate, and his report, on which the warrant issued, to ascertain what and how many forgeries the extradition was intended to apply to or include.

3. SAME—FOR WHAT CRIME AN EXTRADITED PERSON MAY BE TRIED.

The treaty aforesaid is not only a contract between the government of Great Britain and the United States, but it is also the law of this land; and a person extradited under it cannot be detained or tried here for a crime, unless enumerated therein and included in the warrant of extradition; and he may, if occasion require, invoke the treaty in any judicial proceeding as a protection against such detention or trial.

## 4. FORGERY—WHAT CONSTITUTES.

The postmaster at Lewiston, Idaho, issued a postal money order on the application of a fictitious person, without consideration therefor, payable to a certain bank, to which he at the same time wrote in the name of such person, directing that the amount of the order be collected and remitted to him at Pierce City, in a registered package, which he intercepted as it passed through his office, and converted the contents to his own use. *Held*, that the act of the postmaster constituted forgery, both at common law and under the statute of the United States. Section 5463, Rev. St.

*On Habeas Corpus.*

*Frank Ganahl, Richard Williams, and George Burnett, for prisoner.*

*James F. Watson and James H. Hawley, for defendant.*

DEADY, J. On December 19, 1885, a writ of *habeas corpus* was allowed by me, directed to Fred. Dubois, and returnable before this court on December 24th, commanding him then and there to produce the body of Isaac N. Hibbs, together with the cause of his capture and detention. The writ was allowed on the petition of Ella Hibbs, the wife of the prisoner, alleging substantially that in July last said Hibbs was unlawfully delivered to John J. Murphy, a post-office inspector of the United States, by "the authorities of British Columbia," on a pretended warrant of extradition, wherein he was charged with the crime of forging a certain postal money order, 22,768, and by said Murphy conveyed to Lewiston, Idaho, where he was indicted for said crime, and "duly acquitted thereof," but that said Dubois has nevertheless taken said Hibbs into his custody, and is transporting him to Decatur, Illinois, there "to be tried upon an alleged and pretended charge of uttering forged money orders," which crime is not mentioned in said pretended warrant of extradition; that the petitioner is unable to ascertain the tenor of the pretended process on which said Hibbs is detained, but she believes and is advised by counsel that the same is illegal, because there is no legal process whatever to authorize the restraint of said Hibbs; and that said Dubois is about to transport said Hibbs through the county of Umatilla, in this district, *en route* to Iowa.

The writ was served on Dubois on December 21st, as he was passing through Umatilla county with Hibbs in his custody, and, by an arrangement between counsel, he had until January 4th to produce the body and make his return to the writ, at which time an order was made committing Hibbs to the jail of this county pending the proceeding. Owing to the great delay in getting copies of papers from Victoria and Lewiston, the proceeding, by consent of counsel, was delayed from time to time, so that the return was filed on the seventh inst., and the reply thereto on the 15th. The case was heard on the fifteenth, sixteenth, and eighteenth inst., and during the argument, by consent of counsel, copies of the complaint before the committing magistrate at Victoria, in British Columbia, under the Canadian "extradition act of 1877," together with his "judgment" and certificate of committal to the minister of justice of the Dominion government,

and the record of the proceeding in *U. S. v. Hibbs*, in the district court, at Lewiston, were put in evidence, with the understanding that the facts stated therein should have weight in the consideration and determination of the case according to their legal effect.

From the pleadings and papers, it appears that on July 27, 1885, Mr. John J. Murphy, a postal inspector of the United States, made a complaint at Victoria, in British Columbia, before Hon. Mr. Justice CREASE, of the supreme court of said province, under the Canadian extradition act of 1877, in which he accused the prisoner, Isaac N. Hibbs, of the crime of forging and uttering, at Lewiston, Idaho, while acting as postmaster thereat, postal money order 22,768, with intent to defraud the United States; and on July 29th made another complaint under said act before said justice, in which he accused said Hibbs of forging and uttering at the same place, and while so acting as postmaster, 35 other postal money orders, numbered between 22,647 and 22,810, both inclusive, with intent to defraud the United States; that said orders were drawn on the ninth, tenth, and eleventh of April, 1885, for the sum of \$100 each; six of them being drawn on each of the following offices: Leadville, Colorado; Decatur, Illinois; Kearney, Nebraska; Lake City, Minnesota; Plankington, Dakota; and Nebraska City, Nebraska; and that said Hibbs, on May 2, 1885, did forge the name of J. G. Wilson on the backs of three drafts, dated April 24, 1885, and drawn by the National Bank of Nebraska City on the National Bank of Omaha in favor of said Wilson for \$200 each, which drafts were so issued in payment of the six orders drawn by Hibbs on the office at Nebraska City, and were thereafter negotiated by him through the National Bank at Lewiston. After an examination of the case Mr. Justice CREASE held the prisoner for extradition under the tenth article of the treaty of August 9, 1842, with Great Britain, on all the charges made against him, as appears by "the judgment" which he then delivered and refers to in his report to the minister of justice; and on July 31st he issued a warrant committing Hibbs to the common jail of Victoria, "on the ground of his being accused of the crime of forgery within the jurisdiction of the United States of America," until duly discharged.

From this "judgment" it also appears that Hibbs, as postmaster, wrote letters of advice to the postmasters at the several offices on which these orders were drawn, informing them that the same were purchased by J. G. Wilson or W. H. Dent, fictitious persons, so far as appears, and were payable to certain banks, naming them, to which latter he, at the same time, wrote letters, in the name of such purchaser, inclosing the orders, and asking that they be collected, and the funds remitted to the writer in a registered letter, directed to Pierce City, Idaho, which being done, the packages passed through his office, at Lewiston, and were taken out by him, and the contents converted to his own use; that no application was made for any of these orders,

and no money paid for any of them; and that the prisoner confessed, when arrested, to having obtained by this means over \$20,000.

On September 10, 1885, a warrant for the extradition of Hibbs was issued by the minister of justice, addressed to the keeper of the common jail at Victoria and to J. J. Murphy. It recites that Isaac Newton Hibbs, accused of the crime of forgery within the jurisdiction of the United States of America, "was delivered into the custody of said keeper by the warrant of Mr. Justice CREASE, aforesaid, to await his surrender to the United States of America," and that an application for a writ of *habeas corpus*, made to the supreme court of British Columbia by said Hibbs, was refused, and commands said keeper to deliver Hibbs to the custody of said Murphy, and the latter to receive him, and convey him within the jurisdiction of the United States, and there place him in the custody of any person appointed thereby to receive him. That thereafter the said keeper, pursuant to said warrant, delivered said Hibbs to said Murphy, who thereupon conveyed him to Lewiston, and there delivered him into the custody of the proper authority for trial on said charge in the district court for Nez Perces county, Idaho; but it does not appear that said Murphy ever had said warrant of extradition in his possession, or that the same is on file in the clerk's office of said court. That on November 20, 1885, the grand jury of said district court found four indictments against Hibbs, thereby accusing him of the crime of forging, at Lewiston, on April 10, 1885, four certain postal money orders for the sum of \$100 each, and of uttering one such order, with intent to defraud the United States, as follows: No. 1, for forging order 22,773; No. 2, for forging order 22,768; No. 3, forging order 22,770, and for uttering the same, well knowing that it was forged; No. 4, forging order 22,771, and a letter of advice thereabout of the same number, to the postmaster at the office on which said order was drawn, stating that the same had been purchased by J. G. Wilson, and was payable to the national bank at that place,—Decatur, Illinois,—it being also alleged in indictments 1 and 2 that the defendant therein falsely signed and issued a letter of advice in each of said cases, of the same number as the order mentioned therein, stating that the purchaser of the same was J. G. Wilson, and that it was issued in favor of the national bank at Decatur, Illinois.

On the same day a bench-warrant was issued on each of these indictments, indorsed, "Admit to bail in the sum of \$3,000," on which Hibbs was brought into court and arraigned, when a plea to the jurisdiction in indictment 1 was interposed, which was argued and considered as a plea to the other three indictments also, to the effect that the indictments in each case charged a crime for which the defendant was not extradited; which plea set forth the circumstances of the arrest and extradition of Hibbs from British Columbia substantially as above stated, but averred that the charge on which he was arrested and extradited was the forging and uttering of order 22,768, and no



other. The court overruled the plea; whereupon a demurrer was filed to one of the indictments on the grounds (1) that it charged more than one offense; and (2) that the facts stated did not constitute any offense,—which was argued and considered as a demurrer to all four of the indictments, and overruled by the court. On December 8th the plea of “not guilty” was entered in each case, and, by consent of counsel, indictments 2, 3, and 4 were ordered “consolidated for the purposes of a trial thereon,” which commenced on the following day, and ended on the 16th, with a verdict of not guilty, as charged in the indictment, “of uttering order 22,770,” or “of forging order 22,771;” and a statement that the jury were unable to agree on the charge in indictment 2, for forging order 22,768,—which verdict was received, and the jury discharged from the further consideration of the case, and “the prisoner was remanded to custody.” On the following day the court denied a motion to reduce the bail, and made an order allowing the district attorney to submit to the next grand jury “twenty-seven other charges standing against the defendant, as appears by the original complaint on file herein, and the plea to the jurisdiction of the court.”

Fred. T. Dubois, the defendant in this proceeding, is the United States marshal for Idaho, to whom the bench-warrants aforesaid were directed and delivered, being issued, as he avers, “by and under the hand of the Hon. NORMAN BUCK, associate justice of the supreme court of Idaho,” and which are still in his possession, and by virtue of which he claims to detain the prisoner. He also avers that on December 21st, pursuant to an order of the attorney general of the United States, he took Hibbs from the jail at Lewiston for the purpose of conveying him to the penitentiary at Boise, Idaho, for safe-keeping therein, pending his trial on the indictments aforesaid, and, while diligently and in good faith conveying said Hibbs to said prison, he was required to pass through a portion of Umatilla county, Oregon, where he was served with the writ of *habeas corpus* as aforesaid. But the order of the attorney general appears to have been made before the extradition took place. It is dated July 13th, and was made in response to a letter from the marshal, of June 22d, in which he states the insecurity of the jail at Lewiston, and suggests, in the event of Hibbs’ extradition, that he be taken to the prison at Boise. The order provides:

“You will cause said Hibbs, if he is extradited, and delivered to you, to be taken to the penitentiary at Boise City, Idaho, for confinement therein while awaiting his trial, which I understand cannot take place until the November term.”

This court has no supervisory power over the district court of Idaho, and will not, therefore, undertake to inquire into the legality or correctness of its proceedings in a matter within its jurisdiction.

This writ was allowed on the allegation in the petition that the defendant was removing the prisoner to another jurisdiction, for the

purpose of subjecting him to a trial on a charge not embraced in the warrant of extradition. But it now appears that the prisoner was not being conveyed beyond the limits of Idaho for any purpose, but only to a secure place of confinement therein. Therefore the question of whether these bench-warrants are *functi officii*, because only issued to bring the prisoner into court to answer to the indictment; or whether the order of the court remanding the prisoner to custody, after the trial on the three indictments, is not itself sufficient authority for the detention of the prisoner; or whether the marshal, under section 1876 of the Revised Statutes, making him the executive officer of the territorial court in a case where the United States is a party, is not the person to execute that order; or whether he might not do so by confining the prisoner in the penitentiary at Boise, under section 1892 of the Revised Statutes, as amended by the act of June 20, 1874, (18 St. 112,) putting that prison under the care and control of the marshal of the territory, independent of any direction from the attorney general, for which it does not appear that the statute makes any provision in case of a prisoner merely detained for trial, unless implied in the provisions of section 362 of the Revised Statutes,—will not be considered or decided in this proceeding. It being now conceded that the prisoner is not being conveyed beyond the jurisdiction of the territorial court, so far as these points are concerned, the case will be considered as one where the prisoner may and should seek relief in that court for any detention or restraint caused by or resulting from the use or application of its process or orders after the same have fulfilled their function or served their purpose, or the prisoner for any reason is entitled to be discharged from custody thereunder. Hurd, Hab. Corp. c. 6, §§ 1-3.

On the argument a point was made by counsel for the prisoner that the effect of the trial and verdict on the consolidated indictments 2, 3, and 4 was equivalent to a verdict of not guilty generally; that the prisoner, being extradited for the crime of forgery only, and but one forgery, he cannot be held, under the treaty, for trial on any other or further charge of forgery. At common law two or more distinct offenses may be joined in one indictment, in separate counts, when they are of the same general character, and admit of the same mode of trial, and are subject to the same species of punishment. Whart. Crim. Pl. & Pr. §§ 285, 294. These indictments were consolidated under the last clause of section 1024 of the Revised Statutes, which authorizes the joinder in one indictment of "several charges against any person for the same act or transaction, or for two or more acts or transactions connected together," or of two or more distinct crimes of the same class "which may properly be joined;" and provides that if separate indictments are found in such cases the court may order them consolidated.

In cases arising out of the same act or transaction, or two or more acts or transactions connected together, where there are several

counts in the indictment, it will depend on the circumstances of the case whether, on a general verdict of guilty as charged in the indictment, the defendant may be sentenced to more than the maximum punishment for one of the offenses charged. But in the case of two distinct offenses arising out of two distinct acts or transactions, however closely related in point of time or place, the trial is for distinct offenses, of which the defendant may be found guilty and receive the maximum punishment for each; and in either case the jury may find a verdict of guilty as to one count, and not guilty as to another, or they may find a verdict as to one count, and, being unable to agree as to the other, they may be discharged, and the party held for trial on the latter count. *U. S. v. Davenport*, Deady, 264; *Ex parte Peters*, 4 Dill. 169; *U. S. v. Scott*, 4 Biss. 29; *U. S. v. O'Callahan*, 6 McLean, 596; Whart. Crim. Pl. & Pr. § 910; 1 Bish. Crim. Law, §§ 1060, 1062; *U. S. v. Wentworth*, 11 Fed. Rep. 52.

The act authorizing the joinder of offenses in one indictment and the consolidation of separate indictments for distinct offenses was intended to promote the speedy and economical administration of justice in such cases, in the interest both of the government and the defendant, and not practically to merge two or more distinct offenses into one, for the benefit of the latter. Nor is there any reason why a party who has committed two distinct offenses, which, for the convenience of the prosecution as well as the defense, are joined in one indictment, can only be punished as for one, though found guilty of both. Whart. Crim. Pl. & Pr. § 910. But it is still in the discretion of the court, notwithstanding the statute, to say what offenses may be properly joined or indictments consolidated, without injustice or prejudice to the defendant.

In this case the charges are so similar, and the facts so few, that probably the whole 39 charges against the prisoner might properly and conveniently be joined in one indictment. That such joinder might curtail the privilege of taking peremptory challenges to the jury is not material to consider; for it would operate, in this respect, on the prosecution and defense alike. No one has any vested right to peremptory challenges, and congress may diminish or forbid them altogether.

On the argument the senior counsel for the prisoner pressed this point, and cited and relied on *People v. Liscomb*, 60 N. Y. 559, as establishing the general doctrine that a joinder of offenses has the practical effect of fusing the whole into one crime, for which the defendant cannot be sentenced beyond the maximum punishment therefor, even when the jury find a separate verdict of guilty on each count. There were some peculiar circumstances in this case; but I am inclined to agree with Dr. Wharton (Crim. Pl. & Pr. § 910) that it is not likely to become a precedent elsewhere.

According to my impression of the law, the verdict in *U. S. v. Hibbs* disposed of indictment 4 and left 2 for trial as if a jury had not been

impaneled therein. But indictment 3 is in a peculiar condition. It contains two counts: one for forging, and the other for uttering, order 22,770. The jury found the prisoner not guilty of the "uttering," and said nothing as to the forgery. A verdict of guilty on one count, and silence as to another, is generally considered equivalent to a verdict of not guilty as to the latter. Whart. Crim. Pl. & Pr. § 740. But whether the converse of this proposition will hold good is doubtful, but not necessary to decide. No judgment was entered on the verdict, nor does any appear to have been asked for. In any view of the matter, then, there are two indictments—1 and 2—pending against the prisoner in the district court of Nez Perces county, charging him with the commission of distinct forgeries prior to his extradition. In addition to these, there are 27 other charges of forgery against him, which the district attorney has leave to submit to the next grand jury.

But counsel for the prisoner insist that on the face of the warrant the prisoner appears to have been extradited for one forgery only, without specifying what one, which must therefore be taken to be the one for which he was tried and found not guilty; and, assuming that the prisoner cannot legally be held or tried for any offense other than the one for which he was extradited, counsel claim that the prisoner is now illegally restrained of his liberty under process of the territorial court, which, under no circumstances compatible with the facts and inferences of this argument, can any longer be legal or valid, for want of jurisdiction in said court over the offense or the offender. It must be admitted that on the face of the warrant it does not appear that the prisoner was extradited for more than one forgery; and yet he may have been, for anything that appears to the contrary. The warrant simply recites that Hibbs was "accused of the crime of forgery within the jurisdiction of the United States," and that he has been committed by Mr. Justice CREASE for extradition thereon, and authorizes and commands his surrender and extradition accordingly. The writ is ambiguous or indefinite in this particular. The word "forgery" must be interpreted to ascertain whether the warrant was intended to comprehend more than one crime. To do this, the court may consider the circumstances under which it was issued; and these are best shown by a reference to the preliminary stages of the proceeding of which the warrant is but the consummation and end. From these it appears that the prisoner was held by the committing magistrate on 39 distinct charges of forgery, which were certified to the minister of justice for a warrant of extradition thereon. If, under these circumstances, the warrant had been issued for any particular one of these charges only, as the forging of order 22,768, the first one complained of, the only conclusion possible from the premises would be that extradition on the other charges was refused. But as the warrant authorizes the prisoner's extradition on "the crime of forgery," for which he was committed by Mr. Justice CREASE, at

Victoria, "to await his surrender" to the United States, the only reasonable interpretation of the language is that the Dominion government thereby intended and did surrender the prisoner for trial on all the charges of forgery on which he was so committed; and the warrant must be so construed.

But the counsel for the prisoner goes further, and contends that the prisoner cannot be legally held anywhere, or for any purpose, on any process issued on the indictment aforesaid; the same being absolutely void for the reasons: (1) A person extradited under the treaty of 1842 for one offense cannot be charged with or tried for another; (2) the crime charged in the indictments herein is not forgery under the law of the United States,—therefore the prisoner is being held and proceeded against thereon without law, and contrary to the treaty, and warrant of extradition.

The major premise of this argument involves an important and vexed question which must finally be settled by the supreme court. By the tenth article of the treaty with Great Britain of 1842 (Pub. Treat. 320) it is agreed that the parties thereto shall, on mutual requisitions by them, "deliver up to justice all persons who, being charged with the crime of murder, or assault to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other: provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed." The remainder of the article simply provides in detail for the arrest and surrender of the fugitive, in case "the evidence be deemed sufficient to sustain the charge."

In *U. S. v. Caldwell*, 8 Blatchf. 131, (1871,) it was held by Judge BENEDICT that the defendant, although extradited on a charge of forgery, might be indicted and tried on a charge of bribery, and, while in effect admitting that this was an abuse of the extradition proceeding that would constitute a good cause of complaint between the two governments, he decided that such complaints were not a proper subject of investigation in the courts, however much they might regret that they were permitted to arise. In short, he held that the question was not a judicial one, but political, and must be referred to the executive departments of the two governments.

This case was followed by *U. S. v. Lawrence*, 13 Blatchf. 295, (1876,) in which Judge BENEDICT adhered to the conclusion reached in *U. S. v. Caldwell*.

In *Adrian v. Lagrave*, 59 N. Y. 110, (1874,) the court of appeals held that a person brought within the United States on an extradition proceeding, on the charge of burglary, might be arrested therein in a civil action,—two judges, GROVER and FOLGER, dissent-

ing,—and reversed the judgment of the supreme court to the contrary, given by Judges DANIELS, DAVIS, and BRADY, thus leaving the judicial utterance of the state on the subject as six to five.

In *Com. v. Hawes*, 13 Bush, 697, (1878,) the defendant was surrendered, under the treaty of 1842, on the charge of forgery committed in Kentucky, for which he was tried and acquitted. He was also indicted for embezzlement in the same court,—an offense for which he could not have been extradited. A motion to put him on trial for this offense was denied by the trial court. On an appeal to the court of appeals, this ruling was affirmed, for the reason, in brief, that by a necessary implication the treaty forbids extradition except on a charge of some one of the offenses enumerated therein, and, being “the supreme law of the land,” a party brought into this country for trial under it, had a right to set it up as a defense to a prosecution for any other crime while in custody thereunder.

In *U. S. v. Watts*, 8 Sawy. 370, S. C. 14 Fed. Rep. 130, (1882,) the defendant, being arraigned in the United States district court for California on three indictments found therein, pleaded to the jurisdiction that he had been extradited, under the treaty of 1842, for offenses other than those alleged in the indictments; which last are not enumerated in the treaty. Judge HOFFMAN, in a very able opinion, containing an exhaustive review of the authorities, including the opinions of juriconsults and writers on international law, as well as the legislation and diplomatic correspondence on the subject, came to the same conclusions as the Kentucky court of appeals.

In *State v. Vanderpool*, 39 Ohio St. 273, (1883,) the supreme court held that a person extradited under the treaty of 1842 cannot be detained or prosecuted for a different crime, whether included in the treaty or not, than the one for which he was surrendered; and that the treaty, being a part of the law of the land, may be invoked in the courts by any person so detained or prosecuted.

In *Ex parte Ker*, 18 Fed. Rep. 167, (1883,) Judge DRUMMOND, of the United States circuit court for Illinois, refused to issue a writ of *habeas corpus* for the deliverance of the petitioner from custody under process of a court of the state. It appears that Ker, after having been indicted in said state court for larceny, went to Peru, where he was kidnapped and brought back to Illinois, and arrested for trial on said indictments. The grounds on which the writ was refused are not definitely indicated, but it was suggested that the petitioner could set the matter up as a defense to the indictments in the state courts, and, if need be, take the case from there to the supreme court on the question. But it is apparent that the petitioner, not having been brought into Illinois under the treaty with Peru, was not in custody under color of the authority of the United States, or in violation of a treaty thereof, and therefore the United States circuit court did not have any jurisdiction to inquire into the legality thereof. Section 753, Rev. St.; Spear, Extr. 185.

The weight of this array of the authorities is in favor of the proposition that an extradited person cannot lawfully be detained or tried on any charge other than the one on which he was surrendered by the extraditing government.

The treaty of 1842 is not only a contract between the governments of Great Britain and the United States, but by virtue of the constitution of the latter, (article 6,) it is also the supreme law of this land. It contains an explicit enumeration of the offenses for which persons may be extradited under it, and, by a necessary implication, the person surrendered under it is only allowed and held within the jurisdiction of the receiving government for the purpose of trial on the charge specified in the warrant of extradition. For the latter government to detain such person for trial on any other charge would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights. Field, Extr. 107. A right of person or property, secured or recognized by treaty, may be set up as a defense to a prosecution in disregard of either, with the same force and effect as if such right was secured by an act of congress. And so the prisoner cannot lawfully be detained or prosecuted, under this extradition, for the crime of uttering any of these money orders; for, although he was charged with the crime of uttering them before the committing magistrate in Victoria, he was neither committed nor surrendered on that account, but solely for the crime of forgery.

The only other question in the case is, what is the nature of the crime charged in the pending indictments 1 and 2? It has been determined by the proper authority of Canada to be forgery according to the common law,—the law of that country. To what standard we must look for a definition or interpretation of the word "forgery," as used in the treaty of 1842, may be a question. But in a convention made between two countries like Great Britain and the United States, whose language and laws have a common origin, it is more than probable that the term is used therein in at least as broad a sense as at the common law. There are no common-law crimes against the United States, but terms used in its statutes defining crimes, or making certain acts punishable as such, are, unless the contrary plainly appears, to be taken and interpreted in the common-law sense. A statute of the United States (section 5463, Rev. St.) provides:

"Any person who shall, with intent to defraud, *falsely make*, forge, counterfeit, engrave, or print \* \* \* any order, in imitation of, or *purporting to be*, a money order issued by the post-office department, or of any of its postmasters or agents, or any material signature or indorsement thereon, \* \* \* shall be punished by a fine of not more than \$5,000, or by imprisonment at hard labor for not less than two years and not more than five years."

The crime defined in this statute is the common-law crime of forgery, with reference to a postal money order. To "falsely make,

forge, counterfeit, engrave, or print" are all cognate terms, used to define or designate the crime of forgery in some of its many phases. Forgery, at common law, belonged to that class of misdemeanors called "cheats;" but, owing to the serious wrongs and frauds thereby perpetrated, it was distinguished in time by a particular name and a special punishment. Dr. Wharton, (1 Crim. Law, § 653,) citing Blackstone and East, says forgery at common law is "the false making or altering, *malo animo*, of any written instrument." According to Sir James Stephens, (3 Hist. Crim. Law, 186,) the accepted common-law definition of forgery is "making a false document with intent to defraud." Mr. Bishop (2 Crim. Law, § 523) says: "Forgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." And, reduced to a briefer form, he puts it thus: "Forgery is the fraudulent making of a false writing which, if genuine, would be apparently of some legal efficacy." The false making of a writing is forging at common law. *U. S. v. Wentworth*, 11 Fed. Rep. 55.

The prisoner, as postmaster at Lewiston, was intrusted with public documents designed to facilitate the transfer of small sums of money from place to place, and known as "postal money orders." They were delivered to him in blank, as the agent of the postal department of the government of the United States, for safe-keeping, and with authority to fill up, sign, stamp, and issue any one of them, when applied to in writing for that purpose, and the amount for which it is so filled was paid into his office, and not otherwise. Indeed, it is made a misdemeanor, (section 4030, Rev. St.,) punishable by fine not less than \$50 nor more than \$500, for a postmaster to issue such an order, under any circumstances, without the previous receipt of the money therefor. The instruments set out in these indictments, and of which the prisoner is thereby charged with forging, purport to be postal money orders of the United States. They were issued without authority, and contrary to the prohibition of law. They were falsely made, filled up, signed, stamped, and issued by the prisoner, as upon a state of facts which did not exist, with intent to defraud his employer, the United States. This, in my judgment, was a false making within the statute, and such a false making as constitutes the crime of forgery at common law. The writing is false, because it purports to be what it is not. It purports to be a money order of the United States, issued by its authority, after the receipt by its agent of the sum named therein, on the application of a real person, while, in truth and in fact, it was issued without such authority and contrary to law; it was issued without the prepayment of the sum named, on the pretended application of a fictitious person. Admitting the genuineness of these instruments, and nothing appears to the contrary, they had the legal efficacy sufficient to make them a possible or even an efficient means of fraud. 2 Bish. Crim.



Law, 533. Indeed, they were calculated, and exactly calculated, to defraud the United States, by enabling the holder wrongfully to obtain from its agents, at the several offices on which they were drawn, the several sums named therein.

However, it is contended that a person cannot commit forgery by making a false writing in his own name. But it must be borne in mind that forgery is not necessarily confined to the false writing of another's name. It may be, from the nature of things, that it is more often than otherwise committed in that way; but both reason and authority say that it may be committed in other ways. In 3 Bac. Abr. 745, tit. "Forgery," A, it is said:

"The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, \* \* \* but in endeavoring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such falsity to give it an operation which in truth and justice it ought not to have."

And if the deceit consists in making it appear that a man's own act was done under circumstances which would make it valid and genuine, when in fact it was false and unauthorized, the result is the same. In the report for 1840 of the English Commissioners of the Criminal Law, cited by Mr. Bishop, (2 Crim. Law, § 584,) it is said:

"An offender may be guilty of a false making of an instrument, although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic, when it is false and deceptive."

And in *Regina v. Ritson*, L. R. 1 Cr. Cas. 200, (1859,) the very point so suggested was decided accordingly. A person, being the owner of certain land, sold and conveyed the same to another, who went into possession. Thereafter the vendor conveyed the greater portion of the premises to his son, by an indenture which they both executed, and falsely antedated so as to make it appear to have been executed before the real sale took place. Thereupon the son brought suit to eject his father's vendee, who in return caused the parties to the indenture to be indicted for forgery, of which they were duly convicted. The judges were of the unanimous opinion that the act was forgery. Mr. Justice KELLY, C. B., said "that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falsehood of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed." And Mr. Bishop, (2 Crim. Law, 585,) after a careful examination of the subject, on authority and principle, concludes: "Plainly, the broad doctrine is not maintainable that it is incompetent for a man to commit forgery of an instrument executed by himself."

It may be admitted that this case is not in all particulars like any of these; that it is what may be called a new case. But in my judg-

ment there is no difference in law or morals in making a deed with a false date for the purpose of defrauding another, and falsely making and issuing a money order, as postmaster, without consideration or authority for the same purpose. In either case the party does, by force of his falsity and deceit, give the instrument, in the language of the authority above cited, "an operation which in truth and justice it ought not to have."

This case also comes within the well-known rule, long since established, that it is forgery for an agent, who has authority to fill, with a particular sum, a blank in a paper signed by his principal, to fill it with a larger one; or to fill it at all without authority. 1 Whart. Crim. Law, §§ 671, 672.

In my judgment, the filling the blank in each of these orders with the sum of \$100 by the prisoner, when acting as the agent of the United States, contrary to his authority and the positive directions of his principal, being done with intent to defraud, was a false making and forgery thereof.

It is not necessary to consider whether the prisoner committed forgery in writing the name of J. G. Wilson on the backs of the three drafts on the bank at Omaha. Forgery may be committed by thus writing the name of a fictitious person on an instrument. If the existence of such a person is a question of fact and not law, and the instrument appears to be valid on its face, the offense is complete, provided the act was done with intent to defraud. 2 Bish. Crim. Law, 543. The fraud on the United States was accomplished when the money orders were paid to the bank for J. G. Wilson, *alias* Isaac N. Hibbs, and it is not apparent how he can be said to have intended to defraud any one when he put this *alias* on the back of these drafts for the purpose of receiving the amount due thereon. And, although the money with which they were purchased may have been stolen from the United States, still the bank was not injured or defrauded by paying them to Hibbs as indorsee of Wilson, and the fraud on the United States was already perpetrated.

In conclusion, my judgment is that the district court for the county of Nez Perces, Idaho, has jurisdiction of the prisoner, and of the crime of forgery for which he was extradited, and wherewith he is charged in the indictments pending thereon, and therefore this writ of *habeas corpus* must be dismissed, and the prisoner remanded to the custody of the marshal of Idaho.

In the consideration of this case, I own, I have not been unmindful of the fact that while the law ought not to be forced or stretched to meet this or any other emergency, it would be a reproach to the law of this country if the prisoner could not be punished for his misconduct while acting as postmaster at Lewiston. It does not appear that his offense is embezzlement. That crime only occurs when an agent or servant converts to his own use property intrusted to his care and possession by his principal or employer. Rapalje & L. Law

Dict. "Embezzlement;" 1 Whart. Crim. Law, § 1009. But the United States never intrusted Hibbs with the money he obtained from these several postmasters on these false orders, or in any way gave him the possession thereof. On the contrary, he obtained such possession fraudulently, by means of these false writings; and therefore it seems that, if his conduct does not constitute forgery, it is not embraced in the category of crimes defined and punishable by law.

I also think it proper to call attention to the fact that the application for this writ was not made and verified by the prisoner, as required by section 754 of the Revised Statutes. The Oregon Code allows the writ to issue on the petition of the person detained, or that of any one on his behalf. Doubtless, counsel who prepared the application did so under the apprehension that the proceeding was governed in this particular by the Code, and it was inadvertently allowed under probably the same apprehension.

The prisoner must be remanded to the custody of the marshal of Idaho, from whence he was taken; and it is so ordered.

---

UNITED STATES v. SEARCEY.

(District Court, W. D. North Carolina. November, 1885.)

1. CRIMINAL LAW—CORPUS DELICTI.

In all trials for crime the prosecution must prove to the satisfaction of the jury that a crime has been committed before the jury proceed to inquire as to who is the criminal.

2. EVIDENCE—PRESUMPTION DEFINED.

A presumption is a probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other.

3. SAME—KINDS OF PRESUMPTIONS—CONCLUSIVENESS.

When a fact shown in evidence *necessarily* accompanies the facts in issue, it gives rise to a strong presumption as to the existence of the facts to be proved. If the fact in evidence *usually* accompanies the fact in issue, it gives rise to a probable presumption of the existence of the facts to be proved. If the fact shown in evidence only *occasionally* accompanies the fact in issue, it gives rise only to a slight and insufficient presumption; but even this fact may, in connection with other relevant and consistent facts and circumstances, constitute an element in circumstantial evidence.

4. SAME—PRESUMPTIONS OF LAW AND FACT.

Presumptions are of law or of fact. Presumptions of law are usually founded upon reasons of public policy and social convenience and safety which are warranted by the legal experience of courts in administering justice, while presumptions of fact result from the proof of a fact; or a number of facts and circumstances which human experience has shown are usually associated with the matter under investigation.

5. SAME—PROVINCE OF COURT AND JURY.

While the court may always instruct the jury as to the force and effect of legal presumptions, presumptions of fact must always be drawn by the jury; and every fact and circumstance which tends to prove any fact which is evidence of guilt is admissible in evidence on the trial.

6. SAME—PRESUMPTIONS FROM CONNECTED FACTS.

Where presumptions arise from a number of connected and dependent facts, every fact essential to the series must be proved.

7. SAME—CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence consists of a number of disconnected and independent facts which converge towards the fact in issue as a common center.

8. SAME—CIRCUMSTANCES PROVED BY SEVERAL WITNESSES—WEIGHT OF EVIDENCE.

When circumstantial evidence consists of a number of independent circumstances coming from several witnesses and different sources, each of which is consistent and tends to the same conclusion, the probability of the truth of the fact in issue is increased in proportion to the number of such circumstances.

9. CRIMINAL LAW—REASONABLE DOUBT.

The jury must not be satisfied by a mere probability of the truth of the charges in the indictment, but the evidence must produce in their minds an assurance and certainty of guilt beyond a reasonable doubt, before they can pronounce the accused guilty.<sup>1</sup>

Indictment.

*H. C. Jones*, U. S. Atty., for the United States.

*J. W. Bowman*, *W. S. Malone*, and *A. M. Erwin*, for defendant.

DICK, J., (*charging jury*.) The counsel of defendant stated correctly a well-settled principle of law and rule of evidence which arises in the commencement of your investigation. In all trials for crime, the prosecution must prove, to the satisfaction of a jury, that a crime has been committed, before the jury proceed to inquire as to who is the criminal. This elementary and conservative principle has always been regarded as very important in cases involving the life and liberty of the citizen, and it has generally been strictly observed in the courts.

The offense charged in this indictment is the breaking into a distillery warehouse, and gaining access to the contents therein, in the absence of the proper officer. You will first proceed to inquire as to whether the offense charged was committed, and also as to the time when committed, as this fact is very important and material in applying the circumstantial evidence relied on by the prosecution as the ground of conviction. As there is no direct evidence of the breaking and entering into the warehouse, you must consider the facts proved, and determine whether they give rise to presumptions and inferences sufficiently clear and conclusive as to fully satisfy you that the offense charged was committed. In criminal trials, juries, in their investigations, often have to rely on presumptions and circumstantial evidence, as persons who commit crimes usually seek the security of secrecy and darkness to perpetrate their unlawful acts. The facts relied on as the foundation of presumptions, and as constituting the basis of circumstantial evidence, must always be clearly proved.

I will briefly explain to you the legal doctrine of presumptions. A presumption is a probable inference, which common sense, enlightened by human knowledge and experience, draws from the connec-

<sup>1</sup>See note at end of case.

tion, relation, and coincidence of facts and circumstances with each other. When a fact shown in evidence necessarily accompanies the fact in issue, it gives rise to a strong presumption as to the existence of the fact to be proved. If the fact in evidence *usually* accompanies the fact in issue, it gives rise to a probable presumption of the existence of the fact to be proved. If the fact shown in evidence only *occasionally* accompanies the fact in issue, it gives rise only to a slight and insufficient presumption; but even this fact may, in connection with other relevant and consistent facts and circumstances, constitute an element in circumstantial evidence. There is a difference between the legal doctrine of presumptions and evidence which is purely circumstantial. There are presumptions of law and presumptions of fact. Presumptions of law are usually founded upon reasons of public policy, and social convenience and safety, which are warranted by the legal experience of courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only *prima facie* evidence, and may be rebutted. The court may always instruct a jury as to the force and effect of legal presumptions. Presumptions of fact must always be drawn by a jury; and every fact and circumstance which tends to prove any fact which is evidence of guilt is admissible in evidence on the trial of a case. Presumptions of fact result from the proof of a fact, or a number of facts and circumstances, which human experience has shown are usually associated with the matter under investigation.

Circumstantial evidence, strictly speaking, consists of a number of disconnected and independent facts, which converge towards the fact in issue as a common center. These concurrent and coincident facts are arranged in combination by a mental process of reasoning and inference, enlightened by common observation, experience, and knowledge. Where presumptions arise from a number of connected and dependent facts, every fact essential to the series must be proved. Such evidence is like a chain, in which no link must be missing or broken which destroys its continuity. Circumstantial evidence is, like a wire cable, composed of many small associated but independent wires. Wire cables are often used to sustain ponderous bridges over rivers. The strength of the cable depends upon the number of wires which are combined, but some of the wires may be broken, and yet the cable be sufficiently strong to uphold the structure. As no chain is stronger than its weakest link, a chain is less reliable when it has a great number of links, but a wire cable is strengthened by an increase in the number of its wires. This combination of attenuated wires may be stronger than a solid rod of iron of the same size which may have flaws affecting its strength. When circumstantial evidence consists of a number of independent circumstances, coming from several witnesses and different sources, each of which is consistent, and tends to the same conclusion, the probability of the truth of the

fact in issue is increased in proportion to the number of such circumstances.

In the case before you there are no conclusive presumptions of law. There is a legal presumption as to the innocence of the defendant, and that continues in his favor until you become fully satisfied as to his guilt. There are presumptions of fact as to the breaking and entering the warehouse, and as to the time when the act was done. The evidence as to the person who did the breaking is entirely circumstantial, and you must consider the nature of the circumstances in evidence, and the inferences which they suggest, and determine the question whether they are sufficiently strong to satisfy you beyond a reasonable doubt that the defendant is guilty as charged in the indictment.

The witness Williams testified that he was the owner of the warehouse, and had suspended operations in his distillery in September, 1883. At the time of suspension there were eleven packages of whisky in the warehouse, and on each of them there was a warehouse stamp, the serial number and name of the owner. The witness went to his warehouse several times with the store-keeper, and withdrew some packages in the manner required by law. He had not visited the warehouse for three months previous to the thirteenth of February, 1884. On the morning of the fourteenth of February, 1884, a barrel of whisky was found above a half mile from the warehouse, near the public road on the way to Hendersonville. This barrel was properly marked for said warehouse, and about 10 gallons of whisky had been taken out. The witness, hearing that his warehouse had been broken and entered, went to it with the store-keeper on the sixteenth of February, and found the door locked; but he noticed that the staple had been drawn, and was not driven back to its former depth in the facing, and there were marks on the door indicating that some kind of a prize had been used to draw out the staple. On opening the warehouse he discovered that six packages had been taken away.

There is a well-settled rule of law in cases of larceny: That upon proof that a larceny has been committed, and that the property stolen was shortly afterwards found in the possession of the defendant, a presumption arises that he obtained the property feloniously. This presumption is strong if the finding is very soon after the taking, and the weight of the presumption diminishes as the time of finding becomes more distant from the time of taking. This same rule has also been applied as evidence of guilt, in cases of arson and burglary, where property known to have been in a house at the time of burning or breaking has been soon afterwards found in the possession of a person charged with the crime.

In this case, as the barrel of whisky was not found in the possession of any person, no legal presumption arises as to who broke and entered the warehouse.

The finding is a fact connected with the transaction under investigation, and may constitute one of a series of circumstances tending to show the criminal actor, and when the act was done. No person had a right to enter the warehouse in the absence of the store-keeper, and no package could be rightfully removed without having a tax-paid stamp affixed. As the barrel found on the side of the road on the morning of the fourteenth of February had no tax-paid stamp affixed, you may well conclude that it had been unlawfully removed from the warehouse.

The witness Logan testified that he passed along the road on the evening of the thirteenth of February, and saw no barrel in the place where it was found on the morning of the 14th. You will consider this evidence in connection with the fact that the barrel was on the public road, exposed to public view, in deducing the inference as to the time when the barrel was placed on the spot where it was found.

If you are fully satisfied from the evidence that the warehouse was broken open on the night of the thirteenth of February, you will then proceed to inquire who did the breaking. The evidence shows that the night of the 13th was dark and rainy. The first inquiry which will naturally suggest itself to your minds is whether there were tracks of any kind around or near the warehouse. Upon this point there is no evidence, and it does not appear what was the nature and condition of the ground,—whether it was hard and covered with decayed herbage, or soft, and capable of receiving impressions from footsteps or the wheels of any kind of vehicle. The warehouse was situated a short distance from the bank of Broad river, and there was a ford near by leading to the public road on the opposite bank of the river. The counsel of defendant insisted in argument that the removal of a number of large and heavy barrels of whisky would necessarily have left some traces of the depredation. The theory of the district attorney, founded upon some evidence, is that a wagon could be turned around in the ford, and be backed to the bank of the river, near warehouse, and then be loaded by means of skids, and no perceptible impression be left on the ground. These suggestions of counsel are worthy of your consideration in connection with the evidence. There is evidence of freshly-made wagon tracks in the public road, and that those tracks were traced along the road, and from thence through a plowed field in the direction of the house of defendant, but no witness followed the tracks to the house.

On the afternoon of the thirteenth of February the defendant borrowed a one-horse wagon from the witness Hayden, for the professed purpose of hauling rails the next day. Defendant went for the wagon, through the rain, some time after dark, and next day he only hauled a small load of plank from a saw-mill. When the wagon was returned to the owner, the rear axle was broken, and the ends of the bottom planks of the wagon-bed were broken, and split in two places, two or three feet apart. The district attorney insisted that these in-

juries to the wagon-bed were caused by the ends of skids, under the weight of heavy barrels. The counsel of defendant insisted that such damage was done by the load of plank hauled from the saw-mill.

The witness Littlejohn testified that on the morning of the 14th she went to house of defendant, and saw his clothes, wet and muddy, hanging on the yard fence.

The witness Hodges testified that, about three months after the alleged breaking into the warehouse, he found an illicit distillery in the woods about a half mile distant from the house of defendant; that, as he was approaching the distillery, he heard the defendant call out to some one directing him to "bring away the still," and witness soon met the witness Watson with a still on his back. When he entered the distillery he found a whisky barrel in use as a "singling tub." One head was out, and near by he found a barrel head, on which was a part of the name and serial number of the Williams warehouse. An effort had been made with some dull instrument to obliterate these marks.

The witness Howell testified that the defendant told him that he had seen the barrel head in Watson's distillery, and had attempted to cut off the marks with his knife.

If you believe this testimony, you may consider the motive of the defendant in endeavoring to efface those marks on the barrel head. The actions of rational persons are usually prompted by some motive, and from the actions you can generally correctly infer the motives from which they spring.

The witness Watson testified that he had no interest in the distillery at which he was found by the deputy collector Hodges; but he was arrested, tried, and convicted for the offense of illicit distilling at that place. He further stated that in the summer of 1884 he went to the house of defendant, and on request promised to assist him in removing a barrel of whisky to the house of Mrs. Gibbs. The defendant carried him to a place in an old field, where a barrel was buried in the ground, and was covered with a pile of old rails. There was a warehouse stamp on the barrel, but he could not speak of the marks on the barrel, as he was unable to read. I will not make further reference to the testimony of Watson, as I feel sure that you remember all that he said about the transactions at the house of Mrs. Gibbs. He was implicated with the defendant in unlawful transactions, and you can give his testimony such credit as you may think that it deserves.

I will not state fully the testimony of the witness Gibbs, as to defendant selling whisky in the woods near his house out of marked barrels. I will not attempt to recapitulate the testimony of the colored witnesses introduced by the district attorney. These witnesses had some difficulties and disputes with the defendant, and their feelings are somewhat hostile to him.

You may properly consider the conversations of the defendant



with Commissioner Thorn and some of the witnesses for the prosecution previous to the preliminary investigation of the charges in this case before the commissioner. A jury may legitimately draw inferences from attempts on the part of a defendant to prevent a fair or impartial investigation, by endeavors to tamper with witnesses for the prosecution, or by improper propositions to officers of justice.

The rules of evidence and fair argument warranted the district attorney in saying to you that the force of suspicious circumstances, shown in evidence, is augmented whenever the defendant attempts no explanation of facts which he may reasonably be presumed to be able to explain by testimony which he could conveniently have introduced.

The theory presented by the defense is that Williams plundered his own warehouse in the absence of the store-keeper. It was shown in evidence that Williams had two grog-shops, situated, one about 10 miles east, and the other about 10 miles west, on the public road passing near the warehouse; that a short time previous to the thirteenth of February, 1883, he was seen passing and repassing the residence of the witness Whitesides on said road, and on one occasion he had a large keg in his buggy.

The witness Harris testified that a day or two after the alleged breaking into the warehouse, his brother, while hunting partridges, found an empty barrel in the woods, having on it the mark of the Williams warehouse, not far from the said public road; that he communicated the fact to Williams, and carried him to the place where the barrel was found. When Williams had gone away, he found a place where a colt had been previously tied in the woods, and a man's foot-prints near by, made by a No. 8 shoe. He measured these foot-prints and tracks, and then compared them with Williams' foot-prints and the tracks of the colt which Williams rode, and found an exact correspondence. It is also in evidence that the young man who found the barrel rode a mule, and he is not present as a witness, and there is no evidence as to the size of his shoes and the tracks of the mule. No reason is assigned for the absence of this young man.

The witnesses of the defendant further proved that he had, in the spring of 1884, purchased two barrels of whisky from McFarland, a regularly authorized distiller.

I have not recapitulated all the facts and circumstances shown in evidence by the prosecution and defense. I feel confident that 12 minds will remember the entire testimony more fully and accurately than I do.

You have listened with great patience and attention during the progress of this trial, and I feel sure that you will impartially discharge the important duty imposed upon you by the law, and I hope that you will come to a correct conclusion. You must not be satisfied by a mere probability of the truth of the charges in the indictment, but the evidence must produce in your minds an assurance and

certainly of guilt, beyond a reasonable doubt, before you can properly pronounce the defendant guilty.

#### NOTE.

The guilt of the accused must be established beyond a reasonable doubt. *Cornish v. Territory*, (Wyo.) 3 Pac. Rep. 793. The rule requiring proof beyond a reasonable doubt does not require that the jury be satisfied beyond a reasonable doubt of each separate link in the chain of evidence, isolated from its connection with the other testimony. It is sufficient, taking the testimony all together, if the jury are satisfied beyond a reasonable doubt that the defendant is guilty. *Bressler v. People*, (Ill.) 3 N. E. Rep. 521. But in *Marion v. State*, (Neb.) 20 N. W. Rep. 289, it is questioned whether this rule applies to cases where the evidence relied upon to convict is purely circumstantial. See *Walbridge v. State*, (Neb.) 13 N. W. Rep. 209.

A reasonable doubt does not mean all doubt. *U. S. v. Wright*, 16 Fed. Rep. 112. The doubt must be a substantial, and not an imaginary or speculative, doubt. *U. S. v. Keller*, 19 Fed. Rep. 633. It must be such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs in life, *People v. Dewey*, (Idaho,) 6 Pac. Rep. 103; or, as has been said, "such a doubt as a man of ordinary prudence, sensibility, and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination," *Leonard v. Territory*, (Wash. T.) 7 Pac. Rep. 872; "such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the graver and more important affairs of life," *State v. Pierce*, (Iowa,) 21 N. W. Rep. 195; and such a doubt as fairly and naturally arises in the mind of the jury after fully and carefully weighing and considering the evidence which has been introduced, viewed in all the light and circumstances surrounding the case. *State v. Stewart*, (Iowa,) 3 N. W. Rep. 99. And it must arise from a candid and impartial consideration of all the evidence in the case. *State v. Pierce*, (Iowa,) 21 N. W. Rep. 195.

A reasonable doubt is defined in *People v. Guidici*, (N. Y.) 3 N. E. Rep. 493, as "a doubt for which some good reason arising from the evidence can be given;" and in *Minich v. People*, (Colo.) 9 Pac. Rep. 4, as "such a doubt as would cause a reasonable man to hesitate and pause." Judge Dick says, in the recent case of *U. S. v. Hopkins*, *post*, 443, that "the inherent imperfection of language renders it impossible to define in exact and express terms the nature of a reasonable doubt. It arises from a mental operation, and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge, or the occurrence of a particular event, or the existence of a thing."

A preponderance of evidence in a criminal case is not necessary to raise a reasonable doubt. *State v. Porter*, (Iowa,) 20 N. W. Rep. 168; *State v. Red*, (Iowa,) 4 N. W. Rep. 831. Neither the preponderance of evidence, nor the weight of preponderant evidence, is necessary to raise a reasonable doubt. See *Walbridge v. State*, (Neb.) 13 N. W. Rep. 209. And it has been said that "clearly proven" does not mean "beyond a reasonable doubt." *State v. Stewart*, (Iowa,) 3 N. W. Rep. 99.

An instruction to the jury directing them to determine the question of the fact of proof beyond a reasonable doubt, "just as they would determine any fact in their own private affairs," is not sufficient, *Territory v. Lopez*, (N. M.) 2 Pac. Rep. 364; and that it is error to charge that "reasonable doubt" means doubt suggested by or arising out of the proof made, and that in considering the evidence, and arriving at a verdict, "what is called 'common sense' is perhaps the juror's best guide."

It is not error to refuse to instruct the jury that if any one of them entertains a reasonable doubt of the defendant's guilt there must be an acquittal, *State v. Witt*, (Kan.) 8 Pac. Rep. 769; but it is error to instruct that "while each juror must be satisfied beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." *Stitz v. State*, (Ind.) 4 N. E. Rep. 145.

Each juror is to act upon his own judgment, and if he entertains a reasonable doubt is not required to surrender his convictions and render a verdict merely because the other jurors entertain no such doubt. *State v. Hamilton*, (Iowa,) 11 N. W. Rep. 5. Proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns or affairs of life. *Polin v. State*, (Neb.) 16 N. W. Rep. 898.

Where a criminal charge is sought to be proved by circumstantial evidence, the proof must not only be direct, *State v. Clemons*, (Iowa,) 1 N. W. Rep. 546, but also consistent with the guilt of the accused, and inconsistent with any other rational conclusion. *Walbridge v. State*, (Neb.) 13 N. W. Rep. 209; *People v. Davis*, (Cal.) 1 Pac. Rep. 889.

It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every hypothesis except the single one of guilt. *People v. Davis*, (Cal.) 1 Pac. Rep. 889. That testimony not believed does not raise a reasonable doubt. *Binfield v. State*, (Neb.) 19 N. W. Rep. 607. To establish the defense of an *alibi* preponderance of evidence is all that is required. Whether a defendant is entitled to acquittal if the evidence of the *alibi* is sufficient to raise a reasonable doubt of his guilt, *quære*. *State v. Reed*, (Iowa,) 17 N. W. Rep. 150. See *State v. Hamilton*, (Iowa,) 11 N. W. Rep. 5. It has been held that if there is evidence upon which a verdict of guilty might reasonably be founded, an appellate court will not interfere, whatever may be their opinion as to the weight or preponderance of the evidence. *Cornish v. Territory*, (Wyo.) 3 Pac. Rep. 793.

## UNITED STATES v. HOPKINS.

(District Court, W. D. North Carolina. November, 1885.)

### 1. CRIMINAL LAW—PASSING COUNTERFEIT MONEY—WHAT CONSTITUTES COUNTERFEIT COIN.

A counterfeit coin is one made in imitation of a genuine coin. It is not necessary that the resemblance should be exact in all respects. The resemblance is sufficient if the coins are so far alike that the counterfeit coin is calculated to deceive a person exercising ordinary caution and observation in the transactions of business, although the counterfeit would not deceive a person who was expert or has particular experience in such matters.

### 2. SAME—ORDINARY CAUTION.

Ordinary caution is such caution as is ordinarily exercised by prudent men in the particular transactions in which they are engaged.

### 3. SAME—INTENT.

The counterfeit coin must be passed with the intent to deceive before a defendant can be convicted of the crime charged. The mere act of passing a counterfeit coin on one occasion is not of itself evidence of a purpose to deceive; but the manner in which it was done and the attendant circumstances are to be taken into consideration.

### Indictment for Passing Counterfeit Money.

*H. C. Jones*, U. S. Dist. Atty., for the United States.

*F. C. Fisher*, for defendant.

DICK, J., (*charging jury*.) Before the counsel proceeded to address you upon matters of fact, I required them to present to the court their views upon the questions of law involved in this case. The counsel for the defense insisted that the defendant could not be properly convicted on the first count, as the coin alleged to have been passed to the witness Shelton was so imperfectly executed as not to be calculated to deceive a person exercising ordinary caution and observation. The rule of law upon this subject has often been stated by text writers, and also by judges in the trials of similar cases. A counterfeit coin is one made in imitation of some genuine coin. It is not necessary that the resemblance should be exact in all respects. The resemblance is sufficient if the coins are so far alike that the counterfeit coin is calculated to deceive a person exercising ordinary caution and observation in the usual transactions of business, though the counterfeit would not deceive a person who was expert or has particular experience in such matters. This rule has been more fully applied in cases of written or printed instruments which are used in

ordinary business transactions, as prudent men are presumed to exercise reasonable caution in accepting instruments which are evidences of contracts and obligations. The rule is also usually strictly observed in cases where a defendant is charged with *making or having in possession* counterfeit coins, with a fraudulent intent of passing the same, as such fraudulent intent, in some degree, arises from the care and skill with which such coins are manufactured. We know, from the general experience of mankind, that more caution and observation are usually exercised in receiving valuable gold coin than in receiving silver coins of small value.

Coins are manufactured under the authority of the general government, and are designed to be a medium of exchange and a standard of value for the use of people in trade and other business transactions, and are intended for circulation both in the night and day time, among the rich and the poor, the expert and the ignorant. The questions as to what is a sufficient similitude to deceive, and what is ordinary caution in receiving money, must in every trial be determined by a jury, who in their investigations should consider the circumstances attending the particular transaction involved. Ordinary caution is such caution as is usually exercised by prudent men in the particular transactions in which they are engaged. More careful observation is expected of an expert banker, who, in regular hours, daily receives money at his counter, than of a railroad agent, who, in the hurry of business, in the day and night, sells tickets at his window to eager and impatient travelers.

The highly penal laws in regard to the passing of counterfeit money were designed to secure against fraud and deception, not only experienced and cautious traders, but also poor and ignorant persons who seldom handle money, and have acquired no skill in detecting spurious coin. Statutes intended to remedy some existing mischief should be so construed and enforced as to render the remedy effectual, unless such construction and enforcement violate some fundamental principle of law. Genuine silver half dollars coined in the mint of the United States have certain well-known characteristics. They are round, and have graining on the edges. They are of uniform size, thickness, and weight; have the color and luster of silver, which, when dim, may be brightened by rubbing; and they are stamped on both sides with the devices prescribed by law. The counterfeit half dollar introduced in evidence, which the defendant passed to Shelton, has all the characteristic appearances of a genuine silver coin; but the metal is lead or pewter, and the devices are imperfectly executed. You will consider the circumstances under which the coin was received by Shelton in determining the question of ordinary caution.

It appears in evidence that the defendant, on a certain occasion, was in company with several young men, and he offered to *treat the crowd* to 15 cents' worth of apples if some one would give him change

for a half dollar. The defendant at the time had the coin between his hands concealed from view and was rubbing it. The witness Shelton furnished the change, and the defendant dropped the counterfeit coin into the open purse of Shelton. There was no other coin of that denomination in the purse, and the witness did not discover that the coin was spurious for a day or two afterwards. The witness was *actually* deceived, and from the testimony you may well conclude that the coin has such a resemblance to a genuine coin as to be calculated to deceive the taker exercising the observation that would usually be made under the circumstances of the transaction.

The next question which you have to consider is whether the defendant passed the counterfeit coin to Shelton with a knowledge that the same was spurious, as such knowledge is necessary to show a fraudulent intent. The counsel for the defense stated correctly a rule of evidence in saying that a single act of passing counterfeit money gives rise to no *presumption* of a fraudulent intent, and he insisted that the jury should not consider the transaction alleged in the second count of the indictment, as the witness Brown did not sufficiently identify the defendant as the person who passed him the spurious coin. If you are not fully satisfied that the defendant is the person who passed the counterfeit coin referred to in the second count, you must not allow that transaction to influence your judgment. The mere act of passing counterfeit coin on one occasion is not of itself evidence of a purpose to deceive, but you can consider the manner in which the act was done and other attending circumstances as presented by the evidence. I will not recapitulate the evidence in relation to the conduct of the defendant in passing the coin, and his subsequent efforts to redeem the same. I feel sure that you are familiar with all the facts and circumstances of the transaction, as you have listened attentively to the testimony, and your recollections and judgments have been enlightened by the full and able argument of counsel. You must be satisfied of the defendant's guilt beyond a reasonable doubt before you return a verdict of guilty, as the prosecution must fully rebut the presumption of innocence which the law throws over the defendant, before a conviction can be properly obtained.

The counsel for the defense referred to several high authorities, and discussed at length the legal rule as to the nature of a *reasonable doubt*. Judges have sometimes attempted to define the doctrine with completeness and precision, and have always failed. The inherent imperfection of language renders it impossible to define in exact express terms the nature of a reasonable doubt. It arises from a mental operation, and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge, or the occurrence of a particular event, or the existence of a thing. It is a matter that must be determined by a jury, acting under the obligations of their oaths and their sense of right and duty.

In the second count the defendant is charged with passing a counterfeit half dollar to the witness Brown. The evidence shows that some person, in the night-time, passed a counterfeit half dollar to Brown at the door of a store-house in Waynesville. The negotiation for the sale of a watch, which induced the payment of the spurious coin, took place in the store-house, which was dimly lighted. The person who purchased the watch requested Brown to step out of the door, and the payment was made in the darkness. Brown told the purchaser that he was afraid the money was counterfeit, and when he went back into the store-house to examine the coin, the purchaser walked away rapidly. It is conceded that the person who passed the coin to Brown did so with a fraudulent intent. Brown was not acquainted with the defendant at the time of the trade for the watch, but said in his testimony that, according to his best recollection and judgment, he is the man who passed the counterfeit coin at the door of the store-house in Waynesville. When the witness was asked to describe the man who defrauded him, he said, in substance, that the man was of medium height, wore an overcoat, and had Burnside whiskers. This is a rather indefinite description, and, of itself, would not be sufficient to identify the defendant. There is evidence that, at the time the defendant passed counterfeit coin to the witness Shelton, he had Burnside whiskers. The coin passed to Shelton and the coin passed to Brown have certain peculiarities in the devices which show that they were manufactured in the same mould. The knowledge of the witness as to the identity of the defendant is not to be measured by his power of description. No one can fully explain how and why he knows a person whom he has seen upon a former occasion, unless such person has some marked peculiarity. We see a person, and an impression is made on the memory, more or less distinct, according to circumstances, which enables us to recognize such person when we meet him again; but in such matters we are liable to mistake. The witness was engaged in a business transaction with the person in the store-house, and, upon seeing the defendant in court, he says that, according to his best impression and belief, the defendant is the man who passed him the counterfeit half dollar produced in evidence. Belief as to the identity of a person formed by one observation falls short of a more complete knowledge acquired by frequent association; but it is some evidence on the question. The belief of the witness as to the identity of the defendant should be considered by you, in connection with all attendant circumstances, and with other coincident evidence.

If you are satisfied beyond a reasonable doubt that the defendant is the person who passed the counterfeit half dollar to Brown, as charged in the second count of the indictment, you should return a verdict of guilty.

PHIPPS v. YOST.<sup>1</sup>*(Circuit Court, S. D. New York. 1886.)*

## 1. PATENTS FOR INVENTIONS—CHANGE OF LOCATION OF PARTS.

Where an element of a claim performs no other or different function in a new combination than it has performed in other combinations, there is no invention in merely changing its location in the new combination to adapt it to a modification of form of one of the other elements.

## 2. SAME—PHIPPS' PATENT—REISSUE No. 9,690—TYPE-WRITERS.

The sixth and eighth claims of this patent, for the combination, in a type-writer, of key-levers, provided with keys at a point between the fulcrum and the point of attachment to the type-levers, and a shield for covering the pivoted ends of the key-lever, are void for want of patentable novelty.

## 3. SAME.

The seventh claim of this patent must be limited to the peculiar form of type-levers described in the first claim; and, in view of the prior state of the art, the patentee is not entitled to invoke the doctrine of equivalents.

This was a bill for an injunction to restrain infringement of complainant's patent, reissue No. 9,690, dated May 3, 1881, for an improvement in type-writers, the original patent being No. 229,458, of June 29, 1880. There was a prayer for damages, and for an account of profits. Infringement was alleged of the fourth, sixth, seventh, and eighth claims of the reissue patent sued on. The fourth claim of the patent covered specific spacing mechanism for type-writers, and the court decided that it was not infringed by defendant's caligraph. The sixth and eighth claims of the reissue covered a combination, in a type-writer, of key-levers, provided with buttons or keys for the fingers of the operator, and a hand-rest or shield, extending from the pivoted ends of the key-levers, in claim 6, up to a hinged frame or spacing mechanism, and, in claim 8, to a point in advance of the pivotal point of the key. The key-levers were of the third order of levers; their front ends being pivoted adjacent to the operator, and having buttons or keys, marked with the various characters, intermediate their pivoted ends and the point of attachment to the type-levers. Levers of this kind were old in type-writers, and shields for covering up the exposed ends of type-writer levers were old; but patentee was the first to combine such shields with levers of the third order in type-writers. The specification stated that this shield was useful as a hand-rest, and it was so designated in the sixth claim; but it was called a shield in the eighth claim, and the testimony showed, and the court found, that this shield was not useful as a hand-rest, and that it could not be used while the key-levers were being used. The seventh claim was for a combination of key-levers, provided with keys located upon said levers between their pivoted ends and the point of connection to the type-levers, and type-levers provided with types at their striking ends. A peculiar form

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

of type-lever was described in the patent, and claimed in its first claim; but the seventh claim was not limited to this peculiar construction of type-lever. The combination of elements in this claim was shown by the prior art, but the peculiar form of type-lever was new. Defendant used the combination of elements described in this claim, but did not use complainant's peculiar form of type-lever.

*Worth Osgood*, for complainant.

*H. D. Donnelly*, for defendant.

WALLACE, J. Infringement is alleged of the fourth, sixth, seventh, and eighth claims of the reissued letters patent No. 9,690, granted to the complainant, and bearing date May 3, 1881. It is unnecessary to recapitulate the reasons, stated orally upon the hearing of the cause, for the conclusion that the defendant does not infringe the fourth claim of the patent.

It must be held that the inventions specified in the sixth and eighth claims are destitute of patentable novelty. Each of these claims is for a combination, in a type-writer, of key-levers, provided with buttons or keys for the fingers of the operator, and a hand-rest or shield extending from the pivoted end of the key-levers, in claim 6, up to a hinged frame or spacing mechanism, and, in claim 8, to a point in advance of the pivotal point of the levers. The key-levers belong to the third order of levers, and consequently the elements of the claim had not been brought together previously in any type-writer as they are in the machine of the patent. The only useful function of the hand-rest is to protect the key-levers from exposure, by covering them up. The cover is necessarily located between the pivoted ends of the levers and the finger-keys, because there are no other exposed parts of the levers which can be covered up. Although this cover is termed a "hand-rest" in the sixth claim, it is nothing but a shield or cover, and is termed a "shield" in the eighth claim. It performs no office conjointly with the key-levers, and their action in the machine is wholly independent of any assistance from the cover or shield. It is not useful as a rest for the hand of the operator when working the machine, because the keys cannot be efficiently manipulated were the operator to rest his hand upon the cover; nor is it useful to protect the key-levers themselves from the hand of the operator, because the operator could not rest his hands upon the key-levers while at work. The old form of Remington type-writer had the cover or shield located so as to protect the exposed ends of the key-lever. As the key-levers in that machine were levers of the second order, and not of the third, as here, they were not exposed between the operator and the keys. The patentee merely changed the location of the cover or shield to meet the different points of exposure, which, when levers of the third order are employed, is between the operator and the keys. There was no patentable novelty in aggregating together the cover or shield and the levers of the third order.



The invention specified in the seventh claim consists of a combination, in a type-writer, of key-levers and type-levers. By the express terms of the claim the key-levers are such as are provided with keys located upon the levers at a point between the fulcrum and the point of attachment to the type-levers. They are key-levers of the third order of levers, the finger-keys being located between the pivoted ends of the levers and the type-levers. Thus the finger-keys are located between the fulcrum, near the operator, and the letter-forming devices. The type-levers of the claim are not described in it by terms as of any particular form or class; but a type-lever of a peculiar form is made the subject of a specific claim in the first claim of the patent. Unless the claim is limited, however, to one in which the peculiar type-lever of the first claim is an element, the invention specified in the seventh claim is broader than the real invention of the patentee. The patents to Morgan, No. 173,658, and to Miller, No. 168,044, show—one in a type-writer, and the other in a typesetter—key-levers of the third order combined with type-levers or letter-forming devices with finger-keys upon the key-levers located between the fulcrum and the point of attachment to the type-levers. Type-writers with key-levers of the second order, having finger-keys, and combined with type-levers of various descriptions, were old at the time of the patentee's invention. What the patentee did that was new was to combine the key-levers of the third order, provided with finger-keys located between the fulcrum and the type-levers, such as are shown in the patents of Miller and of Morgan, with the peculiar type-levers of the first claim of his patent. Otherwise all that he did was to combine the key-levers of one class of type-writers with the type-levers of another class, without imparting any new function to either of the parts separately, or accomplishing any new result by their conjoint action. The proofs show very satisfactorily that when key-levers like those of the patent are substituted in the Remington machine for the key-levers of the second order employed in that machine no improved result is effected. The Remington machine is fully as efficient and as convenient in use as is the machine of the patent.

If the scope of the seventh claim is limited, as it must be, to the boundaries of the patentee's invention, the defendant does not infringe, as his type-levers are not the type-levers of the claim; and, in view of the prior state of the art, there is no room to apply the doctrine of equivalents.

The bill is dismissed, with costs.

TRAVERS v. BEYER and others.<sup>1</sup>

(Circuit Court, N. D. New York. January 28, 1886.)

## PATENTS FOR INVENTIONS—MAKING AND SELLING SEPARATE MATERIALS OF PATENTED COMBINATION.

Where defendants made, and sold to dealers in the completed article, one of the parts of a patented combination which was of no practical utility or value except for the special purpose of the patentee, and which, of necessity, and to the knowledge of defendants, was to be used for the purpose of infringing the patent, *held*, that they were intentional promoters of the ultimate act of infringement, and therefore answerable as infringers.

## In Equity.

*Antonio Knauth*, for complainant.

*Ward & Cameron*, for defendants.

WALLACE, J. The only question not decided at the hearing of this cause was whether the defendants infringe the second claim of the complainant's patent, by manufacturing and selling the distending hammock blocks which are mentioned in the claim. The claim is as follows:

"(2) The combination of a hammock, A, having suspension ropes, f, f, with detachable distending blocks, g, g, which are notched at their lower edge to space said ropes, f, f, substantially as specified."

The detachable notched distending blocks are the essence of the invention specified in this claim. They are designed to keep the hammock properly distended when in use, at the option of the user, and to be readily removable for convenience when the hammock is not in use, or when the user desires to dispense with them. The blocks are of no practical utility or value except for the special purpose of the patentee. The defendants do not make or sell hammocks, but they are manufacturers of the blocks described in the specification, and sell them to dealers in hammocks, who sell them with or without the hammocks, at the option of the purchasers.

The defendants rely upon the well-settled rule, of common application, that the making and selling of the separate materials of a patented combination is not an infringement of the rights of the inventor. The claim might readily have been so expressed as to preclude any doubt of its sufficiency to protect the patentee, and it is to be regretted that it was not more carefully framed. Nevertheless, upon the authority of *Wallace v. Holmes*, 9 Blatchf. 65, (followed in *Richardson v. Noyes*, 10 O. G. 501, and *Bowker v. Doves*, 15 O. G. 510, the defendants cannot escape liability for infringement. They are making and putting upon the market an article which, of necessity, to their knowledge, is to be used for the purpose of infringing the complainant's patent. They thereby concert with those to whom they sell the

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

blocks to invade the complainant's rights. They are intentional promoters of the ultimate act of infringement.

A decree is ordered for the complainant.

### CELLULOID MANUF'G Co. and another v. TOWER.<sup>1</sup>

(Circuit Court, D. Massachusetts. September 30, 1885.)

1. PATENTS FOR INVENTIONS—PRIOR DECISION, HOW FAR A PRECEDENT.

In an earlier case under this patent (*Celluloid Manuf'g Co. v. Pratt*, 21 Fed. Rep. 313) the question of patentability was raised by the pleadings and evidence, and considered by the court, but no stress was laid on that defense in the argument. *Held*, that this fact deprived the decision of all weight as a precedent in a case where the question of patentable novelty was raised and argued.

2. SAME.

No decision can amount to a precedent unless made after full argument.

3. SAME—INVENTION.

The use of an old material in an old way, to accomplish an old result, is not invention.

4. SAME—PARTICULAR PATENT.

Letters patent No. 210,780, of December 10, 1878, to Celluloid Manufacturing Company, for improvement in piano keys, are void for want of patentable novelty.

#### In Equity.

*Frederic H. Betts*, for complainants.

*E. M. Felt*, *H. M. Ruggles*, and *B. F. Thurston*, for respondent.

Heard by COLT and CARPENTER, JJ.

CARPENTER, J. This is a bill to restrain infringement of letters patent No. 210,780, and dated December 10, 1878, granted to the complainant as assignee of John W. Hyatt, for an improvement in piano keys. The claims of the patent are as follows:

"(1) As a new article of manufacture, a blank key-board covered with a continuous strip or roll of plastic composition, substantially as specified. (2) The within-described process of forming piano or analogous keys, which consists in covering a key-blank with a strip of plastic material, and then cutting out each key from the coated blank, substantially as specified."

The evidence shows that in the manufacture of a key-board for a piano-forte, or other musical instrument, the first step is to form a strip of wood of the size of the whole key-board, and with the groove and mortises which are required for each key. The front edge of this strip of wood, and that part of the top thereof which will appear in sight when the piano is completed, are then covered or veneered with ivory, celluloid, wood, or other suitable substance; the veneer is fin-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

ished or polished; and the key-board is then sawn transversely into separate keys.

The respondent denies infringement on two grounds: In the first place, he contends that the claim of the patent is for a key-board of which the top and front are covered with a single continuous strip of plastic material, whereas the key-board made by the respondent is veneered with one strip for the front, and with a separate strip for the top. In the second place, he contends that the claim of the patent is for one continuous strip of veneer, extending from one end to the other of the key-board, whereas the key-board made by the respondent is covered on the top with two and sometimes three sheets of celluloid.

This patent was the subject of the controversy in *Celluloid Manuf'g Co. v. Pratt*, 21 Fed. Rep. 313. In that case the respondents did not deny the patentability of the invention, but denied infringement on the same grounds which are here urged, and under a similar state of proof. We do not think it necessary to say more on the question of infringement than that we adopt the conclusions of Judge SHIPMAN as announced in that case, and hold that the respondent here infringes the complainants' patent.

In this case, however, the respondent denies that the patent shows any patentable invention. The complainants reply that this question was raised by the pleadings and evidence in the case above cited, and was therein decided in favor of the complainants, and that the decision in that case should be taken here as a governing precedent. We cannot agree with this view. Undoubtedly the judgment in that case concludes the parties thereto on the question of patentability, although no stress was laid on the question by the counsel for the respondents in the argument. But the fact that the question of patentability was not argued, deprives the decision of all weight as a precedent in this case, where the question is raised and argued. No decision, as it seems to us, can amount to a precedent unless made after full argument. We therefore have proceeded to consider the defense of want of patentability.

The evidence shows that long prior to the alleged invention blank key-boards had been covered with continuous sheets of veneer covering several keys. Without detailing other examples, it is sufficient to refer to the fact that Steinway & Sons, of New York, before the year 1860, made and sold two piano-fortes, the key-boards of which were made in the following manner, as described by the witness William Steinway:

He covered the front portion of two grand piano key-boards with one continuous broad sheet of ivory, without any joint whatever in said sheets, extending the whole length of the width of the key-board, and said sheets being of the width of that portion of said key-boards in sight in the finished piano,—about seven inches. \* \* \* I saw both key-boards; the ivory polished ready to be sawed up; both sheets of ivory glued on and in position. After being sawed up into keys, said two key-boards each went into a grand piano,

became part of such piano-forte, and the instruments containing said key-boards, after being publicly exhibited in Steinway & Sons' warerooms, No. 82 and 84 Walker street, New York, for several months, by myself, were sold and delivered to purchasers.

The evidence shows that no difficulty was encountered in the manufacture of these key-boards, and that they were well adapted to the required use. It also appears in evidence that the use of celluloid and similar substances for covering key-boards was known, and had been described in letters patent No. 174,001, granted February 22, 1876, to Ulysses Pratt. The history of the alleged invention may be briefly stated as follows. The inventor knew, from his knowledge of the state of the art, that key-boards might be covered or veneered in either of two ways; that is to say, either by covering that part of the key-board which was to form each key, with a separate piece of veneer, or by covering the whole key-board, or that part thereof intended to form two or more keys, with a continuous sheet of the covering material. He also knew that plastic material, particularly celluloid and similar substances, might be used for such covering. He also knew that the usual method of covering was to use one or more separate pieces of the veneer for each key. But he observed that when this method was used with celluloid, there was a difficulty in the manufacture. This difficulty, and the device by which it was avoided, are described by the inventor as follows.

"One difficulty was that in applying the cement, which contained a solvent of the celluloid, to the surface of the wood, and also of the strip of celluloid, the celluloid in a short time would absorb a large part of the solvent, which would slightly swell the strip, and which, in the course of a week or two, would again shrink and would form a slightly concave surface, both of the celluloid covering and the upper surface of the wooden key. It would also, in many cases, leave too little width of the key, and make the keys too far apart, injuring the appearance greatly. The same shrinkage, or rather tendency to shrinkage, occurs in the whole sheet which covers the key-board, but the series of short curves which occurs by the use of the single strip is prevented in the case of the whole sheet, as the key-board is sufficiently strong to resist the shrinkage of the continuous sheet, and the wavy appearance is thus obviated."

The invention claimed by the patent seems to us to be nothing more than the use of an old material, in an old way, to accomplish an old result. The experience of the trade had shown that it was difficult to obtain sheets of ivory of uniform quality, and of the size requisite to cover the whole key-board, and therefore, in covering with ivory, the better method was to cover each key by a separate strip of that material. The inventor observed that narrow strips of celluloid were likely to warp, and therefore he adopted the other well-known method, which consisted in using a continuous strip. We see here no patentable invention.

It has been strenuously argued, on behalf of the complainants, that this patent ought to be sustained, on the ground that the use of the new material is patentable, because a new result is thereby obtained.

The doctrine here invoked is stated by the supreme court in the following language:

"If such a substitution involves a new mode of construction, or develops new uses and properties of the article formed, it may amount to invention." *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

We do not think the doctrine applies to this case. The mode of construction adopted by the inventor is not new, and we find no evidence in the case to show that the article produced by him has any new uses or properties. Certainly it has no new uses, since both his product and that formerly made are used for the same purpose. Nor does it appear that they do not serve that purpose equally well. In fact, the evidence shows that keys covered with ivory are superior in appearance to those made by the patented method, and that the only advantage arising from the use of celluloid, however applied, is in cheapness of production. We therefore conclude that the patent discloses no patentable invention, and the bill ought to be dismissed.

---

GORRELL v. DICKSON and another.

(Circuit Court, W. D. Pennsylvania. February 1, 1886.)

1. PATENTS FOR INVENTIONS—CREDITORS' BILL TO SUBJECT PATENT TO PAYMENT OF JUDGMENT OF STATE COURT.

A creditors' bill between citizens of different states will lie in a United States circuit court to subject a patent-right to the payment of a judgment recovered in a state court in the same judicial district, even though it might be that such relief would not be afforded by the courts of the state for lack of chancery power.

2. SAME—FRAUDULENT ASSIGNMENT OF PATENT.

Relief upon such bill is not precluded by the previous fraudulent transfer of the patent-right by the judgment debtor,—the original defendant,—the transferee having been brought in and made a co-defendant.

3. SAME—FRAUD ON CREDITORS.

Upon the proofs in this case, *held*, that the transfer of the patent-right was in fraud of creditors, and void as against the plaintiff.

In Equity.

*Henry A. Davis*, for complainant.

*John H. Stevenson*, for defendants.

ACHESON, J. This is a bill in equity to subject a patent-right to the payment of the plaintiff's judgment debt, agreeably to the decision in *Ager v. Murray*, 105 U. S. 126. The original defendant was the judgment debtor and patentee, Henry Dickson, who, having answered that before suit brought he had assigned the patent to Susanna K. Dickson, (his daughter,) she was made a party defendant. The citizenship of the parties and the amount in demand being such as to give the court jurisdiction, the objection based on the fact that the judgment was obtained in a state court sitting within this judicial dis-

trict is without force. Clearly, a creditors' bill between citizens of different states will lie in the United States circuit court to subject to the satisfaction of a judgment recovered in a state court assets which cannot be reached by process at law. *Putnam v. New Albany*, 4 Biss. 365. If it be true, as suggested, that the relief sought would not be afforded by the courts of this state, it must be simply for lack of chancery power, and hence the ruling in *Ewing v. St. Louis*, 5 Wall. 413, has no application here. Indeed, the inability of the state court to grant the needed relief would be a prevailing reason for the exercise of the ample chancery powers of this court. Nor is relief in this form precluded by the transfer of the patent-right, if, as is claimed, such transfer was in fraud of creditors, and void as against the plaintiff. *Gillett v. Bate*, 86 N. Y. 87. Whether such was the character of the transfer is the only disputed question of fact in the case.

The plaintiff obtained his judgment against Henry Dickson on March 10, 1882. He issued a *fi. fa.*, and levied upon a large quantity of personal property, all of which, however, was claimed by the wife and certain of the children of Dickson, and the writ was stayed. Subsequently, and before this bill was filed, the plaintiff caused an *alias* writ of *fi. fa.* to issue, to which there was a return of *nulla bona*. The insolvency of Dickson at the date of the assignment of the patent-right in question is established. He failed in the brick-making business several years ago. For some time he has been employed as general manager for his wife in the same business. The patent-right is for an apparatus for drying green brick. The letters patent were issued to Dickson, December 18, 1883. The invention seems to have considerable value. A single yard-right was sold by Dickson for from \$300 to \$350. When asked on the witness stand what he would have considered the patent worth at the time of the assignment thereof to his daughter if he had been selling to an outside party, he answered:

"I would have sold it for \$5,000 at that time. I don't know what it was worth. Some days I might have sold it for \$1,000; some days I would not."

And in the course of his examination he admitted that he would not have sold it to a stranger for the same price at which he sold it to his daughter. The assignment to her is of the entire patent, (save a solitary township,) and bears date October 2, 1884, the recited consideration being "one dollar and valuable exchanges." In her answer, Susanna K. Dickson states that the consideration for the assignment consisted of "valuable service" she had rendered her father, and money loaned him; but in her testimony she says the sole consideration was the money loaned to him; that at various times during the previous five years she loaned him small sums of money, and that at the date of the assignment he owed her on account of these loans "as much as \$200." She testifies thus:

"There was no understanding at the time the patent was assigned to me that it was to be in full of all he owed me. We had no understanding as to

how much of the debt it was to extinguish. I consider \$150 of the debt extinguished."

The father gives a similar account of his daughter's loans to him, and states that his indebtedness was the consideration of the sale to her. He testifies:

"This sale was made to my daughter at my suggestion. I proposed it first. She had not been urging me to pay the money, or threatening to sue me."

He further says that he has had no arrangement with her about selling rights or managing the patent. He used the patent in his wife's business before the assignment, and he has since continued so to use it in her business, without paying royalty to his daughter.

Such is a summary of the evidence. What is the natural inference to be drawn from the facts shown? It seems to me the only admissible conclusion is that the purpose of the transfer from the father to the daughter was to withdraw this patent-right from the reach of the creditors of the former. All the circumstances evince such fraudulent intent. Aside from everything else, the alleged consideration for the assignment was so grossly inadequate that it cannot stand as against a then existing creditor.

It may possibly be that in this affair the daughter was but a passive instrument in her father's hands; but, while this might be the judgment of extreme charity, good morals and sound law forbid that she shall profit by the transaction, as against the plaintiff. It may be added that it is not claimed, and under the proofs could not well be pretended, that the transfer of the patent was by way of mere security for the daughter's alleged loans.

Let a decree be drawn in favor of the plaintiff.

---

## THE CITY OF ATLANTA.<sup>1</sup>

### THE D. J. FOLEY.

(*District Court, S. D. New York. January 28, 1886.*)

#### 1. COLLISION—TWO STEAMERS—FOG-WHISTLE—ERROR IN LOCATING DIRECTION—FAILURE TO STOP AND REVERSE.

Two steamers, the F. and the A., approaching each other about head on, in the night and fog, first heard each other's whistles when about half a mile apart, but mistook their direction; the F. locating the A.'s whistle about four points on her starboard bow, the A. estimating the whistle of the F. to come from some one or two points on her port bow. The A. ported, shortly afterwards stopped, and, on seeing the lights of the F., reversed full speed. The F. starboarded, and when she saw the lights of the A. increased her speed to cross the bows of the latter. A collision followed, the bow of the A. striking the starboard quarter of the F. *Held* that, while error in locating the sound of a whistle in a fog is not in itself a fault, nor is it a fault to steer away from the

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.



apparent direction of the sound, provided this is accompanied by the order to stop and reverse, if near, (*The Lepanto*, 21 Fed. Rep. 651.) in this case both vessels were in fault for not backing as soon as the repeated exchanges of whistles showed that they were approaching each other.

2. SAME—DEPARTURE FROM RULE—RISK—RULE 18.

A steamer that fails to stop and reverse, as required by article 18 of the rules of navigation, when risk of collision is obvious, takes on herself the risk of the departure from the rule.

3. SAME—FOG—MODERATE SPEED—NINE KNOTS—ARTICLE 13, RULES OF NAVIGATION.

Moderate speed means reduced speed. Therefore, where the steamer A., whose full speed was nine knots, was moving at that rate in a fog, through which lights could be seen about a quarter of a mile only, and came in collision, *held*, that she was sailing in violation of article 13 of the rules of navigation, and her speed was a fault that contributed to the collision.

In Admiralty.

*Benedict, Taft & Benedict*, for the City of Atlanta.

*Parrish & Pendleton*, for the D. J. Foley.

BROWN, J. The above cross-libels were filed by the owners of the steam-propellers City of Atlanta and D. J. Foley, to recover their respective damages arising from a collision, about 50 miles off the Virginia coast, at about 2:40 A. M., on the twenty-ninth of March, 1885. The stem of the City of Atlanta struck the starboard quarter of the Foley at an angle of from two to three points, about 35 feet from the stern, breaking in a hole about 15 inches deep. Two other slight blows were given afterwards, which broke the rail at two points nearer the stern.

The City of Atlanta was 260 feet long, and of about 1,680 tons burden, bound from Charleston to New York. The Foley was 155 feet long, 541 tons burden, and bound from Philadelphia to Jamaica. At the time of the collision a fog was prevailing, but not dense. The chief officers of both steamers agree that they saw each other's white lights when from 500 to 600 yards apart, and almost immediately afterwards saw each other's colored lights also. The wind was light, from the S. S. W., and the sea smooth. Shortly prior to the collision the Foley was making her course due S. Her full speed in a smooth sea was from eight to nine knots. At 11 P. M. the weather had begun to grow thick with fog. It occasionally lifted. At 2 A. M. one could see lights from five to six miles. When the fog came on, the steam pressure had been slackened so as to give, instead of 68 or 70 revolutions per minute, her full speed, only about from 50 to 55 revolutions, which the captain testifies gave her from five to six knots; but the proportion of revolutions stated would make about six and one-third knots. According to the Foley's witnesses, while she was going at this speed due S., the first officer being in charge of the navigation, and blowing regular blasts of the fog-horn about one minute apart, the fog-horn of the City of Atlanta was heard upon the starboard bow. It was answered by a long whistle from the Foley, and her helm was put hard to starboard. Other whistles were given and heard, the City of Atlanta being judged to be about four points off the

starboard bow. The Foley's wheel was kept hard a-starboard until she had veered six points to E. S. E., when her wheel was steadied. At that time the white light and the red light of the City of Atlanta first came into view, bearing nearly abeam, and estimated to be from 500 to 600 yards distant. The master of the Foley then rang a jingle bell, and the engine was put full speed ahead. The helm was kept steady until she was struck by the stem of the City of Atlanta on her starboard quarter, as above stated. At that time the Foley was heading E. by S.

The average full speed of the City of Atlanta was nine knots. Up to the time when the fog-horn of the Foley was heard, she had not materially slackened her speed on account of the fog. Her course was N. by E. She was sounding her fog signal at regular intervals, as required, and heard one blast from the Foley, estimated to be two or three points on the port bow. She answered with one signal and ported. Another whistle was soon heard from the Foley, when the helm was put hard a-port, and the engines stopped. The white light and the green light of the Foley afterwards came into view, estimated to be about 500 or 600 yards distant, when the City of Atlanta, under her port helm, had swung from three to four points to the eastward, and the Foley's lights bore about four points on her port bow. As soon as the Foley's lights came into view, the engines of the City of Atlanta were reversed full speed; so that, at the moment of the collision, she was estimated by her own witnesses to be going not to exceed the rate of two or three knots. Their estimate of the time is that the collision occurred from two to two and one-half minutes after the order to reverse, and that the first fog-horn was heard from one and one-half to two minutes before backing. The wheelsman testified that at the time of the collision the City of Atlanta was heading between E. N. E. and N. by E. Before colliding, the bowsprit of the City of Atlanta fouled in the main rigging of the Foley, which probably carried her off at least half a point to the eastward before the blow.

As the two vessels upon their prior courses differed only one point from each other, it is manifest that one or the other mistook considerably in locating the direction of the fog signals heard by them. Considering their speed, and the courses sailed by both under their respective changes of helm, it is at once apparent that they could not have differed much in their longitude. If the City of Atlanta was four points off the starboard bow of the Foley when the fog signals were first heard, the Foley must have been nearly three points on the starboard bow of the City of Atlanta, instead of two or three points on her port bow, as the latter's witnesses estimated. If the latter judgment was correct, then the City of Atlanta must have been in reality one or two points on the Foley's port bow, instead of upon her starboard bow. Notwithstanding some evidence to the effect that the City of Atlanta was located four points on the Foley's starboard bow

when the whistle was first heard, there are numerous other circumstances which convince me that this supposed bearing was not arrived at until at least the second whistle was heard, and after the Foley had starboarded her helm.

Some additional facts testified to make it possible to project a diagram, approximately correct, of the courses of the vessels up to the point of collision. The Foley, it appears, under her helm hard over, would make a circle of about 1,500 feet diameter; the City of Atlanta, a circle of about twice that diameter. The Foley would therefore make her six points of change up to the time when she saw the other steamer's lights in going 900 feet; that is, at her rate of speed, in a little less than a minute and a half. During this period the City of Atlanta, (whose helm, according to the testimony, would seem to have been ported at about the same time that the Foley's was starboarded,) at the average rate of eight and one-half knots under her slow bell, would make about 1,200 feet, or four points change. This is a somewhat greater change than that estimated by her witnesses up to the time when the Foley's lights were seen; but, considering that she then immediately reversed her propeller, and that the change in her heading thereafter was necessarily comparatively slight, except under the swing that she already had, I think two points of change during the subsequent interval, up to the collision, making five and one-half points in all, is quite as much as was probably made afterwards, leaving a change of three and one-half points up to the time when the vessels sighted each other. In that situation, their courses differing by five points, even if they were but 500 yards apart, they could not have come together, at the speed they were going, in less than two minutes; and, as the Foley's speed was increasing, and that of the City of Atlanta diminishing under the latter's reversed propeller, there could not have been any great difference in the distance each traveled from the time when her lights were seen up to the moment of collision. A drawing made upon these elements, which cannot be greatly amiss, will show that the City of Atlanta was really nearly directly ahead of the Foley, and less than two-thirds of a mile distant, when their signals were first heard by each other.

The most important contradiction in the case relates to the signal of two blasts of the whistle given by the Foley in accordance with article 19 of the new international rules, (act of March 3, 1885; chapter 354, 23 St. at Large, p. 441,) indicating that she would go to port. Some of the evidence on the trial is to the effect that this signal given by the Foley was in answer to a similar signal of two blasts heard by her from the City of Atlanta. Not only, however, do the witnesses from the latter vessel deny that they gave any such signal of two blasts, but various portions of the testimony on the part of the Foley—her log, the first report of the collision, and finally the averments of the libel itself—do not present any such account of the matter. They indicate, on the contrary, that the two blasts given by the Foley were given by her without any such previous signal from the City of Atlanta.

Nor is it credible that, under the new rules, the City of Atlanta, having heard the Foley's fog-whistle, should have given a signal of two blasts, indicating that she was going to port, while, at the same moment, as the proof clearly shows, she ported her wheel to go to starboard. The various statements of the Foley's witnesses as to the whistles given and heard, and the order of them, are all more or less different. The minds of the witnesses would not, at the time, be specially charged to remember those details accurately, and it is very plain that they do not. The testimony of the witnesses of the City of Atlanta is, moreover, to the effect that no signal of two blasts was heard until about the time that the lights of the Foley came into view. The City of Atlanta then answered with one whistle; because, as her master states, the Foley bore four or five points off his port bow, and it was impossible for him to avoid the Foley by going to port. Under such circumstances the strongest weight, in my judgment, is to be given to the contemporaneous actions of the persons in charge of their respective vessels, who were fully competent, and cannot be supposed to have acted most irrationally without cause. Had any signal of two whistles from the Foley been heard by the City of Atlanta soon after the first signal from her was heard, and before the Foley's lights were seen, it is in the highest degree improbable that the master of the City of Atlanta would have continued to bear to the eastward without instantly reversing, as such a signal would indicate that the Foley was also going to the eastward, thereby increasing the chances of collision. I think the probability is, therefore, that the two whistles from the Foley were not given until the time, or about the time, when their lights became visible to each other. This is to some extent confirmed by the testimony of the Foley's mate. In one part of his testimony he states that he first blew a long blast in answer to the City of Atlanta's whistle. Then he heard the latter blow again, about four points on his starboard bow, and that it was after that that he blew his two whistles. If a signal of two sharp blasts were given by the Foley soon after the first signal was heard from the City of Atlanta, I think it clear that they were not heard on the City of Atlanta.

I have made these observations in regard to the vessels' signals, not so much on account of their final importance in respect to the faults of the vessels, as on account of the diversity that appears in the evidence, and the very considerable stress laid upon them in the argument.

In ascertaining the true causes of the collision, the first important point is to determine the relative bearings of these vessels, and their probable distance from each other, at the time when their whistles were first heard. There is little doubt that these whistles were heard by each at about the same time; that of the City of Atlanta, as the larger vessel, being probably heard first on the Foley, and immediately answered by a long blast from the latter, which was heard upon the City of Atlanta. The direction of their courses up to the

time of the collision, as stated in the testimony of each, leaves no doubt that, at the time when the first whistles were exchanged, the City of Atlanta was very nearly directly ahead of the Foley, and probably on her starboard bow, less than a quarter of a point, and the latter about a point only on the former's port bow. Both mistook considerably in locating the sound of the other's whistle. The Foley erred several points; the City of Atlanta, from one to two points.

In the case of *The Lepanto*, 21 Fed. Rep. 651, 656, 658, I have said all it seems to me necessary to be said here in reference to such accidents. Subsequent cases before me confirm the views there expressed in reference to the liability to collision through mistake in locating sounds in a fog, and the full knowledge of this liability that mariners possess; though some mariners, it appears, claim the contrary. *The Alberta*, 23 Fed. Rep. 807, 810. Such errors, however, are not in themselves faults; and, as held in the case of *The Lepanto*, I cannot hold it a fault to steer away from the *apparent* direction of the sound, provided this is also accompanied by the order to stop and reverse at full speed, whenever the signal seems near, which includes any distance less than a mile for vessels going at considerable speed. In the present case, although each steered away from the apparent source of the sound, neither reversed at once, and the Foley did not reverse at all.

This case differs, however, from most others of this character, in that the fog was much less dense. The lights of the vessels, it is contended, could be distinguished upwards of a quarter of a mile distant, though there is doubtless some uncertainty on this point. But this distance is manifestly insufficient for safe maneuvering in the situations which are likely to arise. Article 13 of the new regulations, which requires that "every ship, whether a sailing ship or a steamship, shall, in a fog, mist, or falling snow, go at a moderate speed," must be held applicable in all cases where the fog is such as to diminish very materially the distance at which vessels can ordinarily be distinguished for the purpose of avoiding collisions. The rule must be applied whenever the space within which lights can be seen is insufficient for vessels to avoid each other, in the conditions which are likely to arise, or under the mistakes that may have been previously made as to each other's position, bearing, or course. "Moderate speed" means "reduced speed." *The City of New York*, 15 Fed. Rep. 624. The City of Atlanta did not substantially reduce her speed at all, although she was sounding fog-signals. She was sailing, therefore, in violation of article 13 of the rules of navigation. That this violation of the rule was a fault that contributed to the collision is clear from the evident fact that had her previous speed been substantially moderated to, say, six knots, her subsequent reversal would have enabled her to avoid this collision. It was her previous full speed, in violation of the rule, that rendered her slowing, when the whistle was heard, and her reversal as soon as the Foley was seen, ineffectual. Her speed was therefore a fault that con-

tributed to the collision. *The City of New York*, 15 Fed. Rep. 624, 627, 628; *The Warren*, 25 Fed. Rep. 782; *The State of Alabama*, 17 Fed. Rep. 847, 852. I must consider it a further fault on her part that she did not immediately stop and back when the Foley's whistle was heard, instead of merely slowing. Nine knots an hour is not necessarily and for all ships an immoderate speed. It depends upon the power they have in reserve for immediately stopping. *The State of Alabama, supra*. The City of Atlanta did, indeed, slow; but, considering that she had not previously moderated her speed at all, she was bound to reduce it immediately, and as much as possible, within the limits of fair steerage-way, after hearing the Foley's whistle somewhat near, and until the danger was passed. The whistles, when first heard, were not at such an apparent distance as made delay justifiable considering her previous full speed. They were not estimated at the time to be above half a mile apart, and as it appears from the proofs such was the fact. That, in the nautical sense, was near. The second whistle showed that she was approaching nearer. In such situations it is the duty of both to stop and reverse at once. *The John McIntyre*, 9 Prob. Div. 135; *The Beryl*, Id. 137; *The Alberta*, 23 Fed. Rep. 807; *The Pottsville*, 24 Fed. Rep. 655.

The Foley had, indeed, previously slackened her speed from about eight and one-half knots, her full speed, to probably six and one-half knots, or thereabouts. Excepting this, she is chargeable with the same general faults as the City of Atlanta. She knew from the repeated whistles of the City of Atlanta that the vessels were approaching each other nearer and nearer, and it was then her duty before the two came in sight of each other at once to stop and reverse. Not only was this duty omitted, but when the vessels came in sight of each other, possibly a quarter of a mile distant, and when risk of collision was obvious, she did not stop and reverse as required by article 18, but rang her jingle bell to go at full speed. In violating the rule, she took on herself the risk of departing from it. *The Elizabeth Jones*, 112 U. S. 514; S. C. 5 Sup. Ct. Rep. 468; *The Alaska*, 22 Fed. Rep. 548, 553; *The Arklow*, 9 App. Cas. 136; *The Agra*, L. R. 1 P. C. 501. Her situation at that time was by no means a situation *in extremis*. Had she complied with the rule, there is no question that the collision which occurred at least two minutes later, and after she had gone from 1,200 to 1,400 feet further, would have been avoided. She disobeyed the rule under no apparent necessity, and must accordingly be charged with the loss, equally with the City of Atlanta. Her master does, indeed, testify that, when first seen, the City of Atlanta's lights bore two points aft of abeam of the Foley. But a drawing of their courses backwards from the collision will show that that bearing is impossible. I have no doubt the bearing was at least two points *forward* of abeam, as her log actually reads, and that the testimony as to mistake in the log is erroneous.

There must be a decree dividing the damages and costs in both

## THE HELENA v. THE LORD O'NEIL.

## THE LORD O'NEIL v. THE HELENA.

*(Circuit Court, E. D. Pennsylvania. January 29, 1886.)***COLLISION—INTERFERING COURSES—PRECAUTIONS NECESSARY—DAMAGES.**

If two vessels, under steam, are approaching each other by interfering courses, so as to involve risk of collision, the vessel which has the other on the starboard side must keep out of the way, and adopt whatever means are necessary to enable her to keep off. If the proximity is such that stopping is necessary, she must stop at once.

In Admiralty.

*Charles Gibbons*, for the *Helena*.

*Henry R. Edmunds* and *J. Bayard Henry*, for the *Lord O'Neil*.

BUTLER, J. The two cases will be considered together. The libel filed by the *Helena* charges, in effect, that the *O'Neil*, when first observed, (shortly before the collision,) was running down the bay on a course parallel to that of the *Helena*, about a mile distant, and about one point abaft the *Helena's* starboard beam; that the vessels seemed to be gradually approaching, when suddenly, without warning, the *O'Neil* starboarded her helm, and undertook to cross the *Helena's* bows; that the latter, seeing a collision probable, ordered her wheel hard a-starboard, at the same time stopped the engines, and gave full power astern; that the *O'Neil* continued her course, ("which was of an arc, under the influence of a starboard helm,") and carelessly and negligently ran into and collided with the *Helena*. It is upon this allegation (and the additional statement that the *O'Neil's* lookout was deficient) that the case of the *Helena* rests. A careful examination of the testimony has satisfied me that the allegation is not sustained. The weight of the direct testimony, as well as all the inferences arising from surrounding circumstances, are against it. I am convinced that the *O'Neil*, when first observed, was not abaft the *Helena's* beam; and that she at no time while in view starboarded her helm. The vessels, with a third, had gone down the river and bay, in company; the *O'Neil* in advance, breaking the ice and clearing the way. Having more speed than the others, the latter vessel, as night came on, had gotten several miles ahead, and soon after was lost to view. When in the vicinity of Henlopen light, being unable to send her pilot off, she resolved to turn back, run a few miles up, and anchor eastward of the channel. The testimony is convincing that, after running a short distance up the channel, she turned eastward, pursuing a course to the north-east, or between that and east. As her green light was visible from the *Helena*, when she was sighted by that vessel, it is quite certain that she was on the latter course when first observed. In this situation of the vessels, the duty of the *Helena* is prescribed by rule 19, (Rev. St. § 4233:) "If two ves-

<sup>1</sup> Reported by C. B. Taylor, Esq., of the Philadelphia bar.

sels under steam are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way." That neither vessel changed her course from the time the O'Neil was seen until collision was imminent, seems clear. The fact that they came together, conclusively shows that they were on converging or interfering courses. It is impossible to ascertain the precise course of either. It is quite probable that the Helena was heading a little more to the eastward than her libel and witnesses state, and that the O'Neil was heading E. N. E. Judged by the evidence, the Helena was clearly in fault, in not ascertaining the direction of the O'Neil when the latter was first sighted, and in increasing her speed at this time. She should have stopped at once, if the proximity was such as to render this precaution necessary. If it was not, she should have reduced her speed, and adopted such other measures as were necessary to enable her to keep off. Whether her failure to observe the course and situation of the O'Neil, and to take proper measures to avoid the collision, resulted from neglect to maintain a proper lookout, or from other cause, need not be determined. It was her duty to keep off; and no justifiable cause for failing to do so being shown, she must be held to have been in fault.

Was the O'Neil also in fault? If she saw the Helena's green light, as well as the mast-head light, before changing her course eastward, she was in fault. It must be observed, however, that this fault would not excuse the Helena, because she did not see the former vessel until after the change had taken place, and could not, therefore, have been misled or embarrassed by it. Was the O'Neil, however, guilty of such fault? She had seen the mast-head light when running northward. This, however, gave her no information of the course of the vessel carrying it, and subjected her to no precaution respecting her own course. The evidence satisfies me that the green light was not seen, and was not within view, until the O'Neil had turned eastward. Being upon this course when the situation of the Helena was discovered, it was her duty to hold it. She did so until the collision became imminent, and then turned further eastward in an effort to escape. I am unable to see wherein she failed in duty.

I attribute no material weight to the alleged confession of fault by her master. The vessel was in charge of the pilot, and her movements were governed by his orders. It is incredible that the master, while blaming the Helena, and attributing the collision to her neglect of duty, should have intended to confess that the fault and responsibility were his. He may have been in error in turning back, and running up the bay to anchor, instead of making further effort to get rid of his pilot, and continuing his course to sea, (an error immaterial to the case,) and it is not improbable that this is what he alluded to. Nor do I think it important, under the circumstances, that we have not the testimony of some members of the O'Neil's crew, who had gotten out of reach before the testimony was taken. A decree must therefore be entered in favor of the O'Neil in each case.



CLARKHUFF v. WISCONSIN, I. & N. R. Co. and another.<sup>1</sup>*(Circuit Court, S. D. Iowa. October Term, 1885.)*

## REMOVAL OF CAUSE—WANT OF JURISDICTION—PLEA IN ABATEMENT.

The proper way in which to raise the objection that the circuit court has no jurisdiction of a cause removed from a state court is by plea in abatement.

## Motion to Remand.

*Brom & Carney*, for plaintiff, for the motion.

*Hubbard, Clark & Dawley*, for defendant Iowa Improvement Co., against the motion.

Before Judges LOVE and SHIRAS.

LOVE, J. This case is before us upon a motion to remand to the state court. It was originally commenced in the district court of Marshall county, Iowa. The action is for personal injuries alleged to have been inflicted upon the plaintiff by negligence in the operation of the defendant's railway. The cause was transferred to this court upon the petition of one of the defendants, the Iowa Improvement Company. The plaintiff moves to remand. There is a direct conflict between the statements of the plaintiff's petition and amended petition filed in the state court, and the petition for removal, as to the facts upon which the jurisdiction of this court depends. In the plaintiff's pleadings it is averred, in substance, that the railway was, when the injury was committed, in the possession and ownership of the defendant corporation the Wisconsin, Iowa & Nebraska Railway Company; that said company was in fact using and operating the road, and was and is a citizen of Iowa, of which state the plaintiff is also a citizen. It is also averred in the plaintiff's petition that the other defendant, the Iowa Improvement Company, is a mere adjunct and "parasite" of the Wisconsin, Iowa & Nebraska Railway Company, though existing as a corporation under a distinct corporate name, and that said Iowa Improvement Company was, when the injury was done, "engaged in operating said railway as agent, by contract or otherwise, for, with, and under the control of and in connection with the said Wisconsin, Iowa & Nebraska Railway Company." If these allegations be true, the jurisdiction here cannot be maintained, for the reason that the Wisconsin, Iowa & Nebraska Railway Company is at least jointly liable with the improvement company for the injury complained of; and the former company being a citizen of the same state with the plaintiff, the jurisdiction here fails. The plaintiff's petition contains no allegation as to the citizenship of the improvement company.

The petition for removal was presented by the improvement company, and it avers that said corporation is a citizen of New Jersey; that it was, when the alleged injury was committed, in the "sole occupation

<sup>1</sup>Reported by Robertson Howard, Esq., of the St. Paul bar.  
v.26F.no.7—30

and control of the line of the Wisconsin, Iowa & Nebraska Railway; and that prior thereto, and ever since that time, said improvement company had the exclusive control and operation of the trains, engines, and cars by means of which the plaintiff was injured." It is further averred that "said improvement company was in control and possession of the line of said railroad under a contract to build, equip, and operate said line as against every person, and especially as against said Wisconsin, Iowa & Nebraska Railway Company; that no part of said road, or the cars, engines, fixtures, or adjuncts of said road, had ever been turned over to said railway company at the time of said injury, or before or since; and that, if said plaintiff was injured on said line of railway by the trains, cars, or engines operated thereon, said improvement company is liable, and it only, therefor, if any liability exists."

In every removal case the question is one of jurisdiction. This question is to be determined by the face of the record or by matter *dehors* the record. It is manifest that the record is not and cannot be conclusive of the facts upon which the jurisdiction of the court depends. What is the record when the case is brought here? It consists of the pleadings filed in the state court and the petition for removal. It would be most extraordinary if one party or the other could, by mere allegations in pleading or otherwise, conclusively establish or repel the jurisdiction of the court. If the plaintiff in the state court desired to exclude the jurisdiction of the federal court, and if he could accomplish his purpose by mere pleading, he might in any imaginable case deprive his adversary of his constitutional and legal right of removal by alleging a fact to be true, having no foundation in truth. He might state the value of property involved to be less than \$500, the contrary being the fact. He might allege untruly that his adversary is a citizen of the same state with himself. He might unite some mere nominal party as defendant with the real party in interest, falsely averring such nominal party to be a citizen of the same state with himself, and jointly concerned with the real party in the controversy. Thus might the plaintiff in the state court, by the simple process of pleading, without even the verification of his own affidavit, defeat the whole purpose of the removal act. It is manifest, therefore, that the party seeking the removal is at liberty to make averment against the facts as stated in the pleadings; and it is equally clear that the state court must receive the statement made, in due form, and with proper verification by the petitioner for removal, as true *prima facie*, and proceed no further with the cause, but order the transfer of the case to the federal court. The cause comes here with the record thus made, and this court must primarily, by inspection of this record, determine whether or not the cause shall be remanded. Now, it is clear to my mind that, while the petition for removal must be received as true *prima facie*, and therefore as, upon the face of the record, paramount to the pleadings filed in the state court, it cannot

be taken in its turn as conclusive of the facts upon which the jurisdiction depends. If the petition for removal were taken as conclusive,—if the party moving to remand were not at liberty to aver and show the jurisdictional facts to be contrary to the statement of them in the removal petition,—he would be in his turn, in this court, completely at the mercy of his adversary.

The constitutional and legal right of a party to have his cause heard and determined in the state court, when his adversary is a citizen of the same state with himself, is just as clear and sacred as is the right of the non-resident citizen to be heard in the federal court when the jurisdictional facts are otherwise. It would not do to say that this constitutional and legal right of the resident citizen could be defeated and overridden by his adversary, by the simple means of untruly stating the jurisdictional facts in his petition for removal. Hence the resident citizen may undoubtedly, in moving to remand, make averments in some proper form controverting the jurisdictional facts as stated in the petition for removal. The burden is upon the party moving to remand to aver and show that the jurisdictional facts are not what they are alleged to be in the petition for the removal. The cause is here by virtue of that petition, which is to be taken as *prima facie* true. The removing party does not ask that the cause be remanded. Upon the face of the record he has a right to remain here. The petition for removal is verified. The petitioner has executed a bond of indemnity in favor of his adversary. The cause is rightfully here unless it be shown by the party moving to remand that the real jurisdictional facts did not warrant the removal. How can this be shown? Why, in my judgment, by the simple means of a plea in abatement to the jurisdiction. It may be averred as an extrinsic fact, by such a plea, that both parties are citizens of the same state, or that the value in controversy is less than \$500, or that any other fact exists showing a want of jurisdiction, notwithstanding the allegations to the contrary in the petition for removal. If this were not so, the jurisdiction of the court would depend conclusively upon what might be false and fraudulent allegations of fact respecting the same, upon the face of the record. But what shows conclusively to my mind that the view here taken is correct is the following provision of the removal act:

“639c. DISMISSAL, WHEN. That if, in any suit commenced in a circuit court, or removal from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ of error or appeal, as the case may be.”

Since, then, it is made the duty of the court to dismiss or remand the cause at any stage of its progress when the want of jurisdiction appears, it must surely be a proper practice to raise such a question, in a preliminary way, by plea in abatement to the jurisdiction. It would certainly be a most inconvenient practice to remand or dismiss the cause after exposing the party to long delay and the expense of a trial on the merits, instead of permitting him to have the facts of jurisdiction inquired into summarily in advance of such a trial.

What I have here said is intended as a statement only of the ordinary rule in determining the jurisdictional facts. The petition for removal must be accepted by the court, ordinarily, as a true *prima facie* statement of the jurisdictional facts, subject to the right of averment to the contrary. But I do not question that there may be cases in which the court may look at the whole record, and, without a plea in abatement, determine the jurisdictional facts contrary to the averments of the petition for removal. Thus it might be evident from the pleadings that the alleged facts giving the federal court jurisdiction did not exist, notwithstanding the statement of the petition for removal to the contrary. If, for example, the suit should be upon a note or bill or penal bond for two or three hundred dollars, without any other cause of action, the court might doubtless reject as unfounded a statement in the petition for removal showing the amount in controversy to be over \$500. So, ordinarily, if the plaintiff's petition should claim damages to an amount less than \$500. But cases of this kind must be exceptional. It is manifest, for reasons already given above, that, ordinarily, the statement of the petition for removal must be taken as *prima facie* true, as against the statements and averments of the pleadings filed in the state court.

With these principles in view, let us proceed to consider the present motion. It may be conceded that the plaintiff in his petition in the state courts, which is before us, states a case in which both corporations are liable to him, and that the controversy is not severable. If this were conclusive, the case ought to be remanded. But the petition for removal contains the following allegations:

"That the improvement company was in control of the line of railroad under a contract to build, equip, and operate said line as against every person, and especially the said Wisconsin, Iowa & Nebraska Railway Company; that no part of said line of road, or the cars, engines, fixtures, or adjuncts, had been turned over to the said railway at the time of said injury, or before or since; that if plaintiff was injured upon said line of railway by the trains, cars, or engines operated thereon, your petitioner is liable, and it only, therefor if any liability exists."

Now, if this allegation be true, the railway company is a mere nominal party. The improvement company alone is liable for the injury complained of, and that company has therefore a clear right to be heard in this court. The plaintiff ought not to be permitted to deprive the improvement company of this right by simply joining a

nominal party with him as defendant, and making untrue averments respecting his liability. On the contrary, if the allegations of the petition for removal in question be not true, the plaintiff can so state in a plea in abatement, and take issue upon the jurisdictional fact, which can then be tried like any similar issue.

Upon the face of the record, as the case is now before us, the motion to remand must be overruled with leave to the plaintiff to plead in abatement as above indicated.

---

GOODNOW v. DOLLIVER, Adm'r, etc.<sup>1</sup>

(Circuit Court, N. D. Iowa, C. D. January, 1886.)

REMOVAL OF CAUSE—TIME OF APPLICATION—CASE REMANDED BY SUPREME COURT OF STATE TO SUBSTITUTE ADMINISTRATOR AS PARTY.

After a case has been appealed to the supreme court of a state, and, on suggestion of the death of plaintiff, before entry of decree in the lower court, remanded to that court to have the administrator substituted as party plaintiff, it is too late to remove the case to the federal court.

In Equity. Motion to remand.

*George Crane*, for complainant.

*Theo. Hawley*, for defendant.

SHIRAS, J. On the twenty-sixth of July, 1880, the complainant filed a bill in the circuit court of Webster county, Iowa, against Samuel H. Wolcott, wherein he averred that the Dubuque & Sioux City Railroad Company, in the belief that it was the owner of certain realty in Webster county, Iowa, had paid the state and county taxes assessed thereon; that the supreme court of the United States had subsequently decided that the land did not belong to the railroad company, but to the Iowa Homestead Company; that the defendant, Wolcott, had purchased the lands of the homestead company, and was the owner thereof, but had refused to repay the amount expended in payment of the taxes; that the railroad company had assigned to complainant all its rights and equities in the premises, and therefore complainant prayed a decree establishing the amount due him for the taxes thus paid, and for a lien therefor upon the land in question. To this bill, the defendant, Wolcott, filed an answer on the fourth day of June, 1881. A trial was had, and a decree ordered in favor of complainant, from which an appeal was taken to the supreme court of Iowa. Before the submission of the cause to the supreme court, it was ascertained that the defendant, Wolcott, had died before the entry of the decree in the lower court, and thereupon the supreme court remanded the case to the lower court, in order that the proper parties

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

might be substituted; and thereupon the plaintiff amended his petition, setting forth the death of said Wolcott, and asking that his widow and heirs should be made parties defendant, and on the eighteenth day of April, 1885, filed a further amendment making J. P. Dolliver, administrator of the estate of said Wolcott, a party defendant. The administrator appeared, and forthwith filed a petition for the removal of the cause into this court, averring that complainant, when the suit was brought, and then, was a citizen of the state of New York, and that the administrator, when the suit was commenced, and then, was a citizen of the state of Iowa, and that the amount involved exceeded \$500. The state court granted the petition for removal, and the record having been filed in this court, the complainant moves to remand, on the ground that this court has not jurisdiction.

The record fails to show the citizenship of Samuel H. Wolcott during his life-time. If, when the suit was brought against him, he was a citizen of the same state as complainant, he could not then have removed the cause; nor, by a change of citizenship after the suit was brought, could he have acquired such right. *Gibson v. Bruce*, 108 U. S. 561; S. C. 2 Sup. Ct. Rep. 873. If, by reason of diverse citizenship when the suit was brought, he then had the right of removal, he had at the date of his death, lost the right of removal under the act of 1875, by not applying therefor within the time limited by that act. Consequently, if he had been living when the removal was petitioned for, he could not, under either aspect of the case, have procured the removal of the cause to this court.

Does the administrator stand in any different position? It will be noticed that the administrator is made a party as the representative of the deceased. He is the defendant to the same cause of action and to the same suit that the intestate was.

In *Cable v. Ellis*, 110 U. S. 389; S. C. 4 Sup. Ct. Rep. 85, it was held that if, during the pendency of an action, a third party obtained an interest in the subject-matter of the litigation by a transfer from one of the parties to the suit, and intervened therein, for the protection of his interest, at a time when the right of removal under the act of 1875 had been terminated in the original parties to the action by the lapse of time, such third party could not remove the cause. In *Houston & T. Ry. Co. v. Shirley*, 111 U. S. 358, S. C. 4 Sup. Ct. Rep. 472, the same rule was applied to a case wherein the trustees under a mortgage were substituted for the company as defendants; the court holding "that a substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned." In *Clarke v. Mathewson*, 12 Pet. 164, it is held that a bill of revivor, filed by an administrator in an action, brought during the life-time of the intestate, "is in no just sense an original suit; but is a mere continuation of the original suit." In *Whyte v. Gibbes*, 20 How. 541, it is ruled that a bill of revivor filed by the administrator is merely the continuation of the original suit,

and that the jurisdiction of the federal court is to be determined by the citizenship of the original parties to the cause.

It being true, then, that at the date of the death of the defendant, Wolcott, he had not the right to remove the case under the act of 1875, and that the substitution of his administrator as defendant has the effect only of continuing the original suit, without introducing any new or different cause of action, it follows, under the doctrine announced in the cases cited, that he, as the substitute for and representative of the original defendant, comes into the case subject to the disabilities existing against the original defendant on the question of removal.

The motion to remand is therefore sustained, at the cost of the defendant.

---

*In re Wo Lee.*

(*Circuit Court, D. California.* January 26, 1886.)

**COURTS—JURISDICTION OF CIRCUIT COURT—HABEAS CORPUS—CONSTITUTIONALITY OF MUNICIPAL ORDINANCE.**

While the circuit court of the United States has concurrent jurisdiction with the supreme court of a state on *habeas corpus* to inquire into validity of a municipal ordinance claimed to be in violation of the fourteenth amendment, it should not overrule a decision of the state court, but should refer the case to the United States supreme court for final decision.

*On Habeas Corpus.*

*Hall McAllister, D. L. Smoot, and A. L. Van Schaick, for petitioner.*

*Alfred Clark, contra.*

SAWYER, J. In the *Laundry Ordinance Case*, 7 Sawy. 531, S. C. 13 Fed. Rep. 229, Mr. Justice FIELD and myself held an ordinance to be void, under the fourteenth amendment of the national constitution, on the ground that, as a condition of obtaining a license, the party desiring to carry on that business must obtain the consent of the board of supervisors, which could only be granted upon the recommendations of not less than 12 citizens and tax-payers in the block in which the laundry was to be carried on; and we also held that a party arrested for violation of that ordinance was entitled to be discharged on writ of *habeas corpus* by the circuit court of the United States under the provisions of section 753 of the Revised Statutes of the United States. In the course of the decision in that case, Mr. Justice FIELD observed that in neither case can licenses "be required as a means of prohibiting any avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety; nor can conditions be annexed to their issue which would tend to such prohibition. The exaction, for any such purpose, of a license to pursue a vocation of this nature, or mak-

ing its issue dependent upon conditions having such a tendency, *would be an abuse of authority. Such is evidently the tendency and purpose of the condition required in the ordinance in question in this case, and we have no doubt of its invalidity.*" 7 Sawy. 531, and 13 Fed. Rep. 229. And such must necessarily be the *tendency* of any ordinance that requires the consent, which may be arbitrarily given or withheld, at the discretion of the board of supervisors, or of any other body or person, as a condition precedent to the exercise of a lawful and necessary calling.

After that decision, the ordinance was amended by omitting the requirement of the assent of 12 citizens and tax-payers in the block; but it still prohibited carrying on a laundry business, after complying with numerous onerous conditions, without, in addition, "having first obtained a license or permit therefor, duly granted by resolution of the board of supervisors." It prescribed no specific conditions, the performance of which should entitle the party to a license or permit; but the license or permit, after performance of all the other prescribed conditions, still depended upon the will or pleasure of the board of supervisors. It simply struck out the consent of the 12 tax-payers in the block, and left it to rest upon the consent of the board alone, thereby limiting the number of parties to the consent, without abandoning the principle. For this reason, in *Tom Tong's Case*, the circuit judge thought the objection still remained unobviated. On this point we think he is also sustained by authority. *Mayor of Baltimore v. Radecke*, 49 Md. 217; 33 Amer. Rep. 243-245. In that case, in commenting upon the ordinance then under consideration, the court says:

"It commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine, in the prosecution of any business in the city of Baltimore, to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, *renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether.* But if he should not choose to do this, but only to act in particular cases, *there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented.* It is clear that giving and enforcing these notices *may and quite likely will bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.*"

And it can make no difference that the arbitrary discretion is reserved to a board, instead of a single individual. Indeed, where the



power is reserved to a board, there is a divided responsibility, and each member is less sensitive to its pressure upon his individual conscience. Each gives countenance and support to the others, who act with him. Thus they mutually sustain each other, and break the force of the weight of responsibility.

The district judge of this district, however, not being satisfied, we certified a division of opinion to the supreme court, thereby submitting the question for its decision as to the constitutionality of the ordinance as so amended, and the points of difference appear in *Ex parte Tom Tong*, 108 U. S. 557; S. C. 2 Sup. Ct. Rep. 871; see especially points 3 to 6, inclusive. Unfortunately,—the party being confined for an offense against the laws,—we supposed the certificate to be governed by the provisions of the statute relating to criminal cases, but the supreme court held the practice in civil cases to be applicable, and declined to take jurisdiction because a final judgment had not been rendered before the writ of error was sued out. Thus our misapprehension of the practice prevented a decision of the important, vigorously litigated, and vital questions presented. Had that case been decided, probably there would not have been any occasion for this case, as the principle involved would have been authoritatively settled, but we are ourselves unable to distinguish this case from either of the preceding. If the court was right in those cases, then it seems to us that the ordinance now in question must be void upon similar grounds. Section 1 provides that “it shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry *within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors*, except the same be located in a building constructed of either brick or stone.” Thus, in a territory some 10 miles wide by 15 or more miles long, much of it still occupied as mere farming and pasturage lands, and much of it unoccupied sand banks, in many places without a building within a quarter or half a mile of each other, including the isolated and almost wholly unoccupied Goat island, the right to carry on this, when properly guarded, harmless and necessary occupation in a wooden building is not made to depend upon any prescribed conditions, giving a right to anybody complying with them, but *upon the consent or arbitrary will of the board of supervisors*. In three-fourths of the territory covered by the ordinance there is no more need of prohibiting or regulating laundries than if they were located in any portion of the farming regions of the state. Hitherto the regulation of laundries has been limited to the thickly-settled portions of the city. Why this unnecessary extension of the limits affected, if not designed to prevent the establishment of laundries, after a compulsory removal from their present locations, within practicable reach of the customers of their proprietors? And the uncontradicted petition shows that all Chinese applications are in

fact denied, and those of Caucasians granted; thus in fact making the discriminations in the administration of the ordinance *which its terms permit*.

The fact that the right to give consent is reserved in the ordinance shows that carrying on the laundry business in wooden buildings is not deemed, of itself, necessarily dangerous. It must be apparent to every well-informed mind that a fire, properly guarded, for laundry purposes, in a wooden building, is just as necessary, and no more dangerous, than a fire for cooking purposes or for warming a house. If the ordinance under consideration is valid, then the board of supervisors can pass a valid ordinance preventing the maintenance, in a wooden building, of a cooking-stove, heating apparatus, or a restaurant, within the boundaries of the city and county of San Francisco, without the consent of that body, *arbitrarily* given or withheld, as their prejudices or other motives may dictate. If it is competent for the board of supervisors to pass a valid ordinance prohibiting the inhabitants of San Francisco from following any ordinary, proper, and necessary calling, within the limits of the city and county, except at its arbitrary and unregulated discretion and special consent,—and it can do so if this ordinance is valid,—then it seems to us that there has been a wide departure from the principles that have heretofore been supposed to guard and protect the rights, property, and liberties of the American people. And if, by an ordinance, general in its terms and form, like the one in question, by reserving an arbitrary discretion in the acting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and in effect nullifying the provisions of the national constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act. The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone; or to drive them outside the city and county of San Francisco, to the adjoining counties, beyond the convenient reach of customers,—either of which results would be little short of absolute confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result.

The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital. If the facts appearing on the face of the

ordinance, on the petition, and return, and admitted in the case, and shown by the notorious public and municipal history of the times, indicate a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety, does it not disclose a case of violation of the provisions of the fourteenth amendment to the national constitution, and of the treaty between the United States and China in more than one particular? Does not the petition and return, as clearly as in the *Laundry Case*, present a case within the purview of the observations of Mr. Justice FIELD quoted from that case? We are ourselves unable to distinguish this case, in principle, from the *Laundry Case*. If this means prohibition of the occupation and a destruction of the business and property of the Chinese laundrymen in San Francisco,—as it seems to us this must be the effect of executing the ordinance,—and not merely the proper regulation of the business, then there is discrimination, and a violation of other highly important rights secured by the fourteenth amendment and the treaty.

That it does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be blind to what must be necessarily known to every intelligent person in the state? See *Ah Kow v. Nunan*, 5 Sawy. 560; *Sparrow v. Strong*, 3 Wall. 104; *Brown v. Piper*, 91 U. S. 42.

But the supreme court of the state, in the recent *Case of Yick Wo*, 9 Pac. Rep. 139, has sustained this ordinance in all its parts, both as a valid ordinance under the state constitution, and under the provisions of the fourteenth amendment, and the treaty with China. Although the court does not discuss fully the latter aspect of the case, it announces its view to be that the points are covered by the principles declared in *Barbier v. Connolly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, and *Soon Hing v. Crowley*, 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730. We are ourselves unable to put the same construction on the rulings in those cases, or upon the effect of the principles announced. We have no reason to find fault with anything decided in those cases, as we understand them, but it does not appear to us that these cases go far enough to cover the points now raised. The question now decided does not appear to us to have been presented in either of the cases. Indeed, the writer of this opinion himself denied the writ of *habeas corpus* in *Soon Hing v. Crowley*, on the same grounds adopted by the supreme court on writ of error to this court. He did not consider that that case presented the same points decided in the *Laundry* and *Tom Tong Cases*. That ordinance reserved no arbitrary discretion to grant or refuse a permit. It provided for a license upon complying with prescribed conditions. Its validity was recognized, and we have never denied, and we do not now deny, the

power of the board of supervisors to properly regulate, by reasonable conditions, prescribed in advance, the carrying on of this or any other business in such a manner as to render it reasonably safe.

The *Case of Yick Wo* was argued before the state supreme court in bank, but the opinion was prepared by the commissioners, and the case decided against the petitioner by *the court* for the reason stated in the opinion of the commissioners. It thus had the approval, after full and solemn argument, both of the full court, consisting of seven judges, and of the three commissioners. In view of this decision, and of the views of the district judge of this district in *Soon Hing's Case*, wherein we divided in opinion, we do not feel sufficient confidence in our own views, in opposition to the apparent greater weight of judicial authority in this state, to justify us in holding the ordinance to have been passed in contravention of the provisions of the fourteenth amendment and of our treaty with China, or in discharging the petitioner on that ground.

This court has no appellate power over the courts of the state, and the writ of *habeas corpus* cannot be used to perform the functions of a writ of error. *Ex parte Reed*, 100 U. S. 23. As to the question on *habeas corpus*, there is only a *concurrent* jurisdiction with the state supreme court. The judgment of this court is no more binding on the state court than is that of the state court on this court. It is only a question as to how the judgment of a court of the dignity of the supreme court of California should be regarded and treated by an inferior court of the United States on a question fairly open to doubt, until that doubt shall be resolved by a court whose decision is controlling and binding on both. Although the statute imposes upon us the duty, which we could not, if we would, escape, of investigating and deciding all cases wherein a party alleges himself to be imprisoned in violation of the constitution, laws, and treaties of the United States, even where held in pursuance of a judgment of a state court, yet we do not conceive it to be our duty to overrule the action of the supreme court of the state unless it be upon the clearest and most undubitable grounds; and especially so, since the act of last winter has given an appeal, by means of which the party can have any question of difference between the local state and the United States courts authoritatively determined by a tribunal to the decisions of which all must yield obedience. Besides, a writ of error lies to the state supreme court from the supreme court of the United States, and this is the regular mode appointed by law for a review by an appellate tribunal of the questions involved. This is a case, under the circumstances, peculiarly proper to be left to the final arbitrament of that tribunal. A conflict between the supreme court of the state and the United States circuit court, in regard to a matter open to reasonable doubt, as this clearly is, over which they have concurrent original jurisdiction, would be very undesirable, and should be avoided when

practicable, and especially so where the party can have any error of either court corrected in the ordinary and regular course of judicial proceedings on writ of error or appeal.

The prisoner will be remanded, in deference to what appears to us to be the greater weight of judicial authority in this state, but, if desired, an appeal will be at once allowed, and it is to be hoped that both parties and the United States supreme court will co-operate to procure a speedy decision of a case that involves the interests—*the all*, we may say—of so large a number of Chinese residents, who have been for many years pursuing their peaceful and useful avocations in the laundry business in San Francisco, without any serious injury to the city or its citizens, but to the great convenience of many.

Let the writ be discharged and the petitioner remanded.

---

ILLINOIS CENT. R. CO. v. CHICAGO, B. & N. R. CO.

(*Circuit Court, N. D. Illinois. January 29, 1886.*)

REMOVAL OF CAUSE—FEDERAL QUESTION—CHARACTER OF QUESTION, HOW SHOWN.

In order to give the circuit court jurisdiction of a case, it must appear from the facts and averments in the record that a federal question is really and substantially involved.

Motion to Dismiss.

*B. F. Ayer and John N. Jewett*, for complainant.

*Charles M. Osborn, M. D. Hathaway, and Dexter, Herrick & Allen*, for defendant.

GRESHAM, J., (*orally.*) The Chicago, Burlington & Northern Railroad Company commenced a proceeding in November last in the circuit court of Jo Daviess county, under the statutes of Illinois, to condemn part of the right of way which belongs to the Illinois Central Railroad Company. The latter company appeared in the state court, and caused the proceeding to be removed to this court on the ground that it involved a federal question. On the same day that the record was filed in this court, the Illinois Central Company filed a bill against the Chicago, Burlington & Northern Company, to enjoin it from further prosecution of its condemnation proceedings, and from interfering in anywise with the complainant's possession and enjoyment of its right of way. A motion was made by the Chicago, Burlington & Northern Company to dismiss this bill for want of jurisdiction.

In 1850, congress, by an act, granted lands to the state of Illinois to aid in the construction of designated lines of railway within the state as well as for right of way 200 feet wide. The state, by its legislature, accepted this grant for the purposes specified, and subsequently by an act created the Illinois Central Railroad Company, and

conferred upon it power to construct the designated lines of railway and operate the same. The lands granted to the state were by the latter granted to the Illinois Central Railroad Company to enable it to construct the lines of railroad as required by the congressional grant. The railroad company accepted the grant, constructed the lines of railway which the grant called for, and has operated them to the present time. In the act of congress making the grant, it was provided that the United States should have the right to transport troops and munitions of war free of charge over the roads to be constructed, and that the mails should be carried for a compensation to be fixed by congress from time to time. The grant was made for the purpose, in the main, of encouraging settlement, and thus developing the resources of the state and promoting the welfare of the people. It was a grant by the United States to the state on the faith that the latter, as a sovereign, would see that the conditions of the grant were complied with. It was not the intention of congress to provide for the building of lines of railroad within the state of Illinois which should be perpetually maintained for the benefit of the United States.

It is insisted by counsel for the Illinois Central Company, in support of the jurisdiction of the court, that the act of congress became a substantial part of the company's charter, and that the company became directly bound to the United States to perform the conditions of the congressional grant; that the company took the land granted for right of way charged with a use or public trust; and that the company holds it protected against the state's right of eminent domain. I do not think this position is tenable. The United States has parted absolutely with its title to these lands. It has no more interest in them than it has in any other land which it has disposed of. Lands owned by the United States within a state, and not held for a public purpose, are subject to the state's right of eminent domain and taxation, the same as lands owned and held by individuals. It is only such land as the United States owns and holds within the states, and upon which it maintains public buildings, arsenals, forts, etc., that are exempt from state authority and taxation. The United States does not own or hold the right of way in question in any sense, and it certainly has no such interest in the right of way as denies to the state the right to take it for necessary public uses. *U. S. v. Railroad Bridge Co.*, 6 McLean, 517; *Union Pacific Ry. Co. v. Burlington & M. R. R. Co.*, 3 Fed. Rep. 106.

It is true that the Illinois Central Company in its bill avers that, under the act of congress making the grant, its right of way is not subject to the state's right of eminent domain; but the mere assertion of the right is not of itself sufficient to confer jurisdiction upon this court. The court must see from the facts and averments in the record that a federal question is really and substantially involved, and no such question is presented in this case.

It will be observed that the United States is not complaining of the proposed action on the part of the state. It is the Illinois Central, a creature of the state, which denies the right of the state to exercise the asserted authority over the right of way. This corporation acquired its rights, including right of way, directly from the state. It is responsible to the state and not to the United States. It cannot be assumed that the state of Illinois, in accepting the congressional grant, intended to relinquish absolutely its authority over so large a portion of territory as was granted for the right of way.

I hold that it does not appear from the bill or the proceedings in condemnation that there is a real and substantial controversy, involving a construction of the congressional act of 1850, and the bill is therefore dismissed.

---

UNITED STATES v. CENTRAL PAC. R. Co.

(Circuit Court, D. California. January 29, 1886.)

**1. PUBLIC LANDS—GRANT TO CALIFORNIA & OREGON RAILROAD—MEXICAN GRANT.**

Under the act of congress of July 25, 1866, lands outside of the 40-mile limit of the grant, and within the exterior limits of a Mexican grant, are subject to selection, instead of alternate odd sections not otherwise disposed of at the time of the location of the road, situated within the 40-mile limit, any time after the rejection of the Mexican grant.

**2. SAME—LIEU LANDS.**

Such grant does not attach to the odd sections outside of the 40-mile limit until the selection is actually made by the railroad company, under the direction of the secretary, in lieu of other lands disposed of within the limit.

**3. SAME—PREMATURE SELECTION—SUIT TO VACATE PATENT.**

Where such lands have been prematurely selected and patented, a suit by the United States to vacate the selection and patent on the ground of mistake, commenced after the rejection of the grant, will not be sustained when no private party has acquired an interest in the land, and the United States has assumed no obligation or suffered no injury.

**4. SAME—BOUNDARIES OF GRANT.**

Where three exterior boundaries of a Mexican grant are designated, and the quantity of land known, the fourth boundary may be ascertained by running a line parallel, to the opposite boundary, a proper distance therefrom to embrace the quantity of land called for.

In Equity.

*S. G. Hilborn*, for complainant.

*Bennett & Wigginton*, for respondent.

SAWYER, J. This is a suit on the part of the United States to vacate three patents, alleged to have been improperly issued, by mistake, to respondent, for lands, under the congressional grant to the California & Oregon Railroad Company, to aid in the construction of a railroad under the act of July 25, 1866. 14 St. 239. The patents cover, in the aggregate, something over 20,000 acres. It is alleged that, at the time the grant attached by the definite location of the

road, the lands were within the exterior limits of a Mexican grant, a claim for confirmation of which was then pending and undetermined in the courts; and, being *sub judice*, they were not public lands, and therefore not within the terms of the grant. The dates of the patents, respectively, are March 5, 1872, March 17, 1875, and December 20, 1875. The plat of definite location provided for under the act was filed on July 1, 1867. The alleged Mexican grant to Dias was presented for confirmation, August 31, 1852, and rejected by the board of land commissioners, as invalid, October 30, 1854. The district court affirmed the decision rejecting the grant, March 15, 1858. On July 1, 1857, the claim was again rejected by the circuit court, and the decree of the circuit court was affirmed on appeal, and the grant finally rejected by the United States supreme court, March 3, 1873. The grant, therefore, never had the approval of any one of the four tribunals through which it passed, and the original decree of 1854, rejecting it, was affirmed by each; showing that there never was any merit in the claim under the alleged grant.

It thus appears that the first patent sought to be vacated was issued before the final rejection of the grant; and the other two, more than two years, and two years and nine months, respectively, after its final rejection. It is insisted, on the part of the complainant, that the grant attached to the specific lands on the filing of the map of definite location, in 1867, before the final rejection of the Mexican grant, and that the lands being then *sub judice*, they were not public lands, and not within the terms of the grant, as held in regard to the Moquele-mos grant in *Newhall v. Sanger*, 92 U. S. 761. But these lands occupy a position entirely different from those involved in that case, and are not within that decision. None of these lands are within the 40-mile limit of the grant, to the specific odd sections of which the grant, by virtue of the act, *ipso facto* attaches by the filing of the plat of definite location. The act grants "*every alternate section of public land, not mineral, designated by odd numbers,*" to the number of 10 on each side of the road, or within a limit of 40 miles, or 20 miles on each side, and then provides that "*when any of said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the secretary of the interior, in alternate sections, designated by odd numbers as aforesaid, nearest to, and not more than 10 miles beyond, the limits of said first-named alternate sections;*" that is to say, within 10 miles outside of the 40-mile limit. The grant, in such cases, does not attach to the specific sections of outside lands on the filing of the plat, but it remains a mere "*float*" until it is ascertained that there is a deficiency within the limits of the specific grant, and until the selections outside are in fact made under the direction of the secretary of the interior.



The grant does not attach to the specific alternate sections of lieu lands, until the selection is so made by the company which has the right of selection, and recognized and adopted by the secretary. If, at the time the selection is so made, recognized, and adopted, the lands have ceased to be *sub judice*, and are subject to grant, the rights of the company vest, and are valid. This point is settled in the case of *Ryan v. Central Pac. R. Co.*, arising under the same grant to the Oregon & California Railroad Company, and affected in precisely the same way by the claim under the same alleged Mexican grant to Dias, (5 Sawy. 260,) affirmed on appeal by the United States supreme court, (99 U. S. 383;) also affirmed in *St. Paul, etc., R. R. v. Winona R. R.*, 112 U. S. 731; S. C. 5 Sup. Ct. Rep. 334; see, also, *Grinnell v. Railroad Co.*, 103 U. S. 739; *Cedar Rapids R. Co. v. Herring*, 110 U. S. 27; S. C. 3 Sup. Ct. Rep. 485; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414; S. C. 5 Sup. Ct. Rep. 208. The land involved in that case was embraced in one of these very patents,—that of March 17, 1875,—and the case is therefore decisive on the identical question now presented. Both the circuit and supreme courts distinguished that case from *Newhall v. Sanger*, on the principle hereinbefore stated. The lands covered by the last two patents set out in the bill are situated precisely as the lands in *Ryan's Case* were, under the same grants and judicial proceeding. They are all lieu lands, situate outside the 40-mile limit, and required to be selected before the congressional grant attached. The lands were selected and patented after the rejection of the Dias grant, and after they had ceased to be *sub judice*. The title is therefore perfect as to the lands covered by the two patents issued in 1875, as is settled by the cases cited. The patents were therefore properly issued, and as to those two patents the bill must be dismissed.

The only difficulty I have in the case relates to the first patent issued in 1872, before the final rejection of the claim under the Dias grant, and while the lands so selected and patented were still *sub judice*, and for that reason only, at the time, not subject to selection under the decision of *Newhall v. Sanger*. The lands embraced in this patent were also all lieu lands, situated outside the 40-mile limit of the specific grant. They are therefore in an entirely different position from those inside the 40-mile limit. Those inside the 40-mile limit, under the decision of *Newhall v. Sanger*, being *sub judice* at the time the grant attached to the specific odd sections, were not within the terms of the grant at all, but were regarded, in a certain sense, as otherwise disposed of, and the subsequent removal of the cloud over them did not bring them within the grant; but being reserved, or so otherwise disposed of as to prevent the attaching of the congressional grant, congress provided for supplying the deficiency, not out of these same lands after the claim should be rejected, but out of other outside lands that should be open to grant when the selection should be made. Congress intended that the company should have

its 10 sections of land to a mile of the road, and provided that the lands outside might be selected in lieu of those already appropriated inside. In *Ryan's Case*, the supreme court held that the deficiency may be made up by selections made outside, at any time after any lands covered by a pending claim are released from that claim,—after they cease to be *sub judice*, and become, in every sense, public lands, open to other disposition. Now, the only difficulty in regard to this patent is that the selection and patent were *premature*. Had the company waited till after the rejection of the Dias claim before selecting, the selection and patent of identically the same lands would have been good. If this selection and patent fail, the defendant has not yet received all the lands to which it is entitled, and it is still entitled to select an equal amount of outside lands, within the prescribed limits, provided a sufficient quantity of unappropriated lands is left for the purpose. It does not appear that anybody else has acquired any interest in these lands patented, and since they are patented it is not probable that any adverse interest in them has been acquired. If this patent should be vacated, therefore, being no longer *sub judice*, the defendant would now be entitled to select these identical lands to compensate for the loss, and receive another patent for them. The Dias grant having long since been finally rejected, the lands would be now open for selection, in pursuance of the decision in *Ryan's Case*. The result might be only the substitution of another patent to the same lands for the one vacated, at a great deal of further trouble and expense, both to the United States and to the respondent.

The very defense to this suit, brought long after the final rejection of the grant, and the claim now set up to the lands under these patents, is a manifestation now of an intent to select those lands. Morally and legally, the defendant is, at this time, clearly entitled to have these identical lands, there being no adverse claims to them. There is really no equity shown now in favor of the government; on the contrary, the equities are all in favor of the defendant. The government has realized all the benefits to be derived from the construction of the road. It made the same innocent mistake, if mistake there was, made by the defendant, whereby the defendant may lose a part of its lands, and treated these lands as subject to grant, and, having done so, it has presumably received double the ordinary price for the alternate even sections; so that it has in fact given away nothing and lost nothing. It has received all it ever would have received had the grant not been made, and the road either not been built or been built. The government is not, and it never would have been, entitled to anything more. Whereas, on the other hand, the defendant, in case of the vacation of the patent, has not got its full consideration,—has not got all the land to which it is entitled, and which the government is bound to give,—and it is now entitled to select the very same lands should the patent be vacated. In fact, the probability is that all the other lands have already been sold by the government,

and the purchase money received by it, so that there will at this time be no lands, except these, out of which the grant can be satisfied. It does not appear that the United States has assumed any obligation to any other persons with respect to these lands, or that they can in any way sustain any injury by the action already had, *merely prematurely* taken, or that anybody else has acquired any adverse interest or claim in the lands, or will in any way suffer by reason of these patents.

The vacation of this patent would involve the necessity of issuing another for the same or an equal amount of other lands, if any there be,—of substituting a new patent for the one vacated. Courts of equity will not do a vain thing,—will not sustain a bill where no injury results from a mere innocent error in fact or law, upon which it is based,—and especially where that error consists merely in doing a little earlier than it should be done a thing entirely proper to be done at the right time, and which, if now undone, must be done over again. "Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts *which are followed by no loss or damage.*" 1 Story, Eq. Jur. 203. Much less will it interfere where no injury results, and there is only a mutual innocent mistake, there being no moral wrong, and where, to correct the mistake in favor of the party complaining, would be inequitable, and work an injury to the other party. Besides, if these lands are now lost, all others open to selection having at this day been disposed of, by reason of a change of circumstances the parties could not be placed *in statu quo*. 1 Story, Eq. Jur. 138a, 138c.

I think this patent is now within the principles established in *Ryan's Case*. On these grounds the bill, as to this patent also, should be dismissed.

A large portion of the lands—some 6,000 acres, I believe—covered by these patents, and indicated in the answer and evidence, were conveyed in fee-simple absolute, to various parties before the filing of this bill, and the defendant had, at the commencement of this suit, and it now has, no interest whatever in them. There is no party to the bill having any interest in these lands. No decree can be made affecting those lands without having the holders or somebody having an interest in them before the court. *U. S. v. Central Pac. R. Co.*, 8 Sawy. 81; S. C. 11 Fed. Rep. 449. The grantees of the patentee of these lands are indispensable parties to the suit. The bill must be dismissed, as to those lands, on this ground also.

So, also, the defendant has conveyed all of these lands, in trust, to secure the payment of ten millions of bonds issued and put upon the market. Although the respondent is interested in the *residuum* after paying the bonds, and is therefore a proper and doubtless a necessary party as to all the lands not absolutely conveyed, as before stated, there is no bondholder, trustee, or representative of the bond-

holders, made a party to the suit, and no decree can be made affecting their rights without their presence.

It is but just to observe, on behalf of the government, that this suit was commenced *after* the decision of *Newhall v. Sanger*, 92 U. S. 761, and *before* the decision in *Ryan v. Central Pac. R. Co.*, 99 U. S. 382, and in all probability without noticing the distinction established by the latter case, which takes this suit out of the rule laid down in the former. Had the latter case been decided before the commencement of this suit, it is but reasonable to presume that it never would have been instituted.

The answer *denies* that certain portions of the lands embraced in the first patent of 1871, and some embraced in the other patents, were within the exterior boundaries of the Dias grant, and alleges that they are wholly outside those boundaries. If this be so, those lands so situated are, in any event, properly patented to the defendant, and the title to them is perfect. Whether they are within the exterior boundaries of the Dias grant or not depends upon how those boundaries are located, and probably no two surveyors, if left to themselves, would have located them alike. Surveyor General Hardenburg located them in 1873, and Col. Von Schmidt again located them in 1880 under the direction and supervision of Surveyor General Wagner, and, I presume, expressly for the purposes of this suit, as I know of no other occasion for their determination; but these locations differ very widely. In my judgment, Wagner's location is much more accurate than Hardenburg's. Wagner's seems to have been located upon the principles stated and approved by Mr. Justice FIELD in *Henshaw v. Bissell*, 18 Wall. 255, decided after Hardenburg's location was made. Says Mr. Justice FIELD:

"With the breadth of the tract stated, the quantity limited, the southern and eastern lines designated, all the elements are given essential to the complete identification of the land. A grant of land thus identified, or having *such descriptive* features as to render its identification a matter of absolute certainty, entitled the grantee to the specific tract named." Id. 253.

I think, upon the principle thus stated, we have the elements from which the exterior boundaries of the Dias grant can be ascertained with reasonable certainty. It is described in his petition, and the annexed *desino*, which was an unusually good one. We find from these documents that his grant was "joining to the north with Mr. Larkin's farm; to the south with the plains, also vacant; to the east with lands already selected; and to the west by the mountains,—and the quantity was 11 square leagues." Turning to the *desino* we find it platted in a parallelogram, as bounded on the north by Larkin's land, beyond which we cannot go; on the east, by Jimeno's grant; on the south, by a line drawn at right angles to the westward from Jimeno's west line, on the south of which line the lands, for a distance of many miles, appear to be vacant. The mountains are

sketched to the west. Thus we have all the elements for locating the grant with proximate and reasonable precision,—Larkin's line on the north, Jimeno's on the east, the mountains on the west, and the quantity. Taking these given boundaries, and the fourth can only be drawn just far enough south to take in, with the other three boundaries, 11 square leagues of land. On any other principle there would be no certainty whatever, for the south line might just as well be drawn fifty miles further south as five. This appears to me to be the only reasonable way of determining the exterior boundaries of the Dias grant, and I adopt it. It seems to have the approval of the United States supreme court, and this seems to be the theory of Surveyor General Wagner's survey in 1880, and the boundaries so located to have his approval. Upon this location of the exterior boundaries of the grant, a considerable portion of the land in the oldest patent issued, as well as in the others, lies entirely outside of the exterior boundaries of the grant, and they were *public lands, not sub judice*, at the time of the selection and patent, and were then subject to be taken by the railroad grant, and were rightfully patented. On this ground, also, the bill must be dismissed as to all the lands embraced in the several patents which lie north of the south line of Larkin's *rancho*, and all lying south of a line drawn from the Jimeno ranch westward to the mountains, far enough south of Larkin's line to embrace 11 square leagues of land.

The bill must be dismissed on the several grounds indicated, and it is so ordered.

---

UNION TRUST CO. OF N. Y. v. MISSOURI, K. & T. RY. CO. and others.  
(Original Bill.)

MISSOURI, K. & T. RY. CO. v. UNION TRUST CO. OF N. Y. (Cross-Bill.)

(Circuit Court, D. Kansas. November Term, 1880.)

1. RAILROAD MORTGAGE—SURRENDER OF ROAD TO COMPANY—TENDER OF INTEREST DUE.

The trustee in the mortgage of a railway company, which was in default in respect of interest on bonds, the principal of which did not mature for many years to come, having, as mortgagee, entered into possession of the railroad, was, on being tendered and paid the amount of past-due interest, decreed to surrender the possession of the road to the railway company.

2. SAME—MORTGAGES CONSTRUED.

Article 12 of the mortgage or deed of trust of the Missouri, Kansas & Texas Railway Company to the Union Trust Company, trustee, of February 1, 1871, and article 13 of the same mortgage, construed. Article 12 was held to give the trust company power to enter and hold possession only in case there has been a default in the payment of interest, and a majority of the bondholders had elected to have the whole sum secured by the mortgage to become due. Article 13 was held to give the trustee power to enter and hold possession of the road only in case of default in the payment of interest, followed by a written demand of the holders of at least 1,000 bonds to foreclose the mortgage.

**8. SAME—AGREEMENT TO PREVENT NECESSITY OF FORECLOSURE.**

The railway company, being embarrassed, made on the first of March, 1876, a contract with its bondholders, whereby the Union Trust Company, as mortgage trustee, was let into the possession and operation of the road, under the further agreement that the first mortgage bondholders would accept 4 per cent. interest instead of 7 per cent. for the years 1876, 1877, 1878, and 5 per cent. interest instead of 7 for the years 1879, 1880, and 1881. In the event of earnings over the amount necessary to pay this *reduced* rate of interest, the agreement provided that such excess should be used in the payment of interest on the second mortgage income bonds. At the end of four years the company tendered the full amount of all interest on the first mortgage bonds then in arrears, and demanded the possession of the road. *Held*, construing the agreement of March 1, 1876, that that agreement was made for the benefit and protection of the railway company, to prevent the necessity of a foreclosure, and that the railway company, on the payment of all interest in arrears, at the full rate, was entitled to the possession of its property, although the six years contemplated by the March agreement had not elapsed; and that the income bondholders had no right to insist on the property remaining for two years more in the hands of the trust company.

On the first of February, 1871, the railway company executed a first mortgage to the Union Trust Company of New York, as trustee, to secure bonds, amounting to more than \$14,000,000, drawing 7 per cent. interest. In 1874, the company made default in the payment of interest, and a receiver was appointed under a second mortgage. In 1875, the trust company filed a bill to foreclose the said mortgage of February 1, 1871; the receiver continuing in possession. On March 1, 1876, the first mortgage bondholders, as parties of the first part; the second mortgage bondholders and all other creditors, parties of the second part; the Missouri, Kansas & Texas Railway Company, party of the third part; and the Union Trust Company as party of the fourth part,—entered into an agreement known as the "March agreement."

Briefly stated, that agreement having recited that the railway company is unable at present to pay its existing indebtedness, etc., provides that the first mortgage bondholders will accept 4 per cent. interest for the years 1876, 1877, and 1878, and 5 per cent. interest for the years 1879, 1880, and 1881, to be paid semi-annually on the days mentioned in the bond, to-wit, February and August 1 of each year; and the said first mortgage bondholders agreed that, for all past-due interest, and the difference between the reduced rate and the mortgage rate, as it became due, they would accept income bonds under an income mortgage to be made and dated April 1, 1876, at 80 cents on the dollar; the said income bond to draw interest at the rate of 6 per cent., payable semi-annually, from the net or surplus earnings of the railway company. Bill, Schedule A, 14, 15. The floating debt creditors and the holders of the second mortgage bonds, under the original second mortgage of September 1, 1873, who held first mortgage bonds as collateral security, were authorized to retain said first mortgage bonds, and credit them upon their indebtedness at 65 cents on the dollar, flat. For the balance, after crediting these collaterals, they were to receive income bonds under the in-

come mortgage, at 80 per cent. of their par value. Bill, Schedule A, 17, 18. The persons holding preferred stock, issued under the agreement of April 27, 1874, were to receive income bonds therefor.

The third article of the said agreement provides how said net surplus earnings should be applied. Adjustments were to be made semi-annually, as each coupon upon the first mortgage bonds became due. The net or surplus earnings were to be applied—*First*, to the payment of the interest on the first mortgage bonds at the reduced rate; *second*, any excess, to the payment of the interest on incomes; *third*, any excess beyond this, to be applied towards increasing the payment of the interest on the first mortgage bonds up to the mortgage rate; *fourth*, if there is no excess of the net earnings over the reduced rate, the first mortgage bondholders were to take, semi-annually, income bonds for the balance at 80 cents on the dollar; *fifth*, if there should be no net earnings applicable to the income bonds, they were to accept, semi-annually, interest-bearing scrip, which it was provided was to be redeemed, with 6 per cent. interest, before any dividend could be declared upon the stock.

On April 1, 1876, the income mortgage was executed, pursuant to that agreement. This is strictly an income mortgage, whereof the principal is due in the year A. D. 1911; and it provides that, from the net or surplus earnings of the said railway company the interest thereon shall be paid semi-annually, at the rate of 6 per cent. per annum, on the first days of April and October in each year.

Article 3 of said income mortgage provides that the railway company, after it shall have received its property, "shall thereafter pay, from its net or surplus earnings remaining after the payment of the expenses of operating and keeping in repair its railway and property herein described, and the interest of the several incumbrances prior hereto, the interest on the said bonds, semi-annually, at the rate of 6 per cent. per annum, on the first days of April and October of each year. If the said net or surplus earnings, so remaining as aforesaid, shall not be sufficient to pay the interest of the said bonds as the same becomes due and payable, the said railway company shall issue to the holder of the coupons or interest warrants of the said bonds scrip certificates, payable only from the net or surplus earnings of the railway company, which, with the interest thereon, at the rate of 6 per cent. per annum, shall be redeemed and paid by the railway company before it declare or pay any dividend on the capital stock."

The sixth article of the income mortgage, which is the one which contains the company's covenant, and the only one referred to in the scrip as the authority under which the scrip is issued, is as follows:

"Art. 6. The said party of the first part [railway company] hereby further agrees that it will pay, or cause to be paid, the said bonds to be issued and secured by this mortgage as aforesaid, and that it will pay the interest thereon semi-annually, in lawful money, from its net or surplus earnings remaining

after the payment of the expenses of operating and keeping in repair its railway and property herein described, and of the interest on the several incumbrances prior thereto and hereinbefore described, provided said net or surplus earnings shall be sufficient therefor, and that in case its said earnings in any six months shall be insufficient therefor, then, for any such deficit, said party of the first part agrees to issue a scrip certificate, redeemable, with six per cent. interest, before any dividend shall be declared upon the stock of said company, [which follows, in this respect, the language of article 3 of the March agreement.] Said party of the first part further agrees to pay all taxes, levies, and assessments imposed and assessed, and which may hereafter be imposed or assessed, upon the premises, franchises, and property hereby conveyed, or intended so to be, and also the United States government tax upon the interest payable on said bonds, and each of them, and that it will, at its own expense, do or cause to be done all things necessary to preserve and keep valid and intact the lien and incumbrance hereby created."

Under certain orders of court and the March agreement, the receiver surrendered to the trust company, and that company took possession of, the railway, July 1, 1876, and remained and was in possession in November, 1880, when the tender below mentioned was made.

Under the operation of the agreement of March 1, 1876, and the corresponding provisions of the income mortgage of April 1, 1876, the interest up to December 1, 1880, on the first mortgage bonds, at the reduced rate, had been paid in full, but not promptly, in cash, out of earnings, except the coupon which fell due February 1, 1880, and the one which fell due on August 1, 1880. The difference between the reduced rate and the mortgage rate during this period had, pursuant to said agreement and mortgage, been settled for each six months by the issue and delivery of income bonds therefor. There being no earnings reported by the trust company as applicable to the payment of interest on the income bonds, this interest had every six months been settled by the issue of the company's interest-bearing scrip.

The eleventh article of the March agreement provided that "when-ever the net proceeds of the business of the road shall be sufficient, pursuant to the foregoing provisions, to pay the first mortgage coupons in full, and whenever such payment in full shall have been made in succession, it shall be the duty of the trust company to settle its accounts with the railway company, and deliver to the railway company all and singular the money and property so held by it in trust." The twelfth and thirteenth articles of the first mortgage of February 1, 1876, construed by the court, are sufficiently stated in the opinion.

In November, 1880, the railway company tendered to the trust company the full amount of all past-due interest on the first mortgage bonds, and demanded the possession of its property. The trust company refused to accept it, and filed a bill in the United States circuit court for the district of Kansas, making the railway company, and representatives of its mortgage bondholders, defendants, setting out *in extenso* the different mortgages and the said March agree-



ment, and claiming, among other things, that it was entitled to keep in possession, under the terms of the mortgage of February 1, 1871, and of the said March agreement. This is the original bill above entitled.

The railway company appeared and answered; and also filed a cross-bill against the trust company, alleging the mortgages, the March agreement, and the tender, which it offered to keep good, and praying that in case it should keep the tender good, and make payment of all arrears of interest on the first mortgage bonds, that the trust company be decreed to deliver to it its road and property. A decree was entered, ordering and adjudging that, upon settlement of the accounts between the trust company and the railway company, under and pursuant to the eleventh article of the agreement of March 1, 1876, and upon payment in full of all interest on the first mortgage bonds secured by the mortgage of February 1, 1871, the trustee be ordered to deliver the road and property to the railway company.

The statutes of Kansas (Comp. Laws 1862, p. 149) provided that all mortgages or deeds of trust to secure the payment of money shall be foreclosed in court, and not by sale out of court; also provided (Comp. Laws 1862, p. 68, "Mortgages") that, in the absence of stipulation to the contrary, the mortgagor of real property may retain the possession thereof. These statutes were cited on the argument, although not referred to, and apparently considered immaterial, in the opinion of the court.

*John F. Dillon*, for defendant.

*Wheeler H. Peckham*, for plaintiff.

*Charles E. Whitehead*, for the Amsterdam syndicate of bondholders.

MILLER, Justice. This bill is brought by the trust company, a citizen of New York, in the circuit court of the United States for the district of Kansas, against the railway company, a citizen of the United States, and others. The primary object of the bill is to obtain the direction of the court in regard to the performance of the duties of complainant, as trustee, under circumstances mentioned in the bill, and it comes before me on the bill, the answer, and cross-bill of the defendant company, and certain exhibits and affidavits.

I have not the time to write out in full the reasons governing my decision, and in what I have to say must refer to instruments whose construction controls my action, without copying them, or even the material parts of them.

The Union Trust Company is in possession of the road of the railway company, as trustee under two mortgages, and an agreement in writing concerning that possession, (the agreement of March, 1876.) The possession was delivered under the written agreement and on order of the court in the year 1876, and the road, its finances, and all its affairs have been managed by the trust company ever since. The reason for placing the possession of the road in the hands of the trust company was its failure to pay the interest on the mortgages

of the railway company, in which event those mortgages contained a provision for such transfer of possession. In the actual event, however, the agreement already mentioned as to the nature and duration of the possession so transferred, and the duties and powers of the trust company while in possession, was the more immediate arrangement under which the trust company took charge of the road.

The main purpose of the control and possession of this long line of railroad, extending many hundred miles through several states and the Indian Territory, being placed in the trust company, was to secure the payment of the debts of the company, and especially of the first mortgage bonds, in regard to which the trust company was the trustee. The railway company, which was then much in debt, and had for some time failed to pay its interest, now comes forward and tenders all that is due and unpaid on any of its funded debt, alleges its ability in future to meet all its obligations as they mature, and demands to be restored to the possession and control of its property. If there exists no special reason to the contrary, this would seem to be a reasonable demand, for the principal of the bonds for which the trust company is trustee is not due for more than 20 years, and if the railroad company is ready to pay all the interest that is due, and is in condition to meet its future installments, it is difficult to see why its property should be kept out of its control, and in the hands of another corporation, for these 20 years.

The points raised by the trust company are (1) that the provision of the first mortgage, under which they hold, requires this; and (2) that the written agreement, (of March 1, 1876,) under which they took possession, requires that they should at least hold it for the present.

The mortgage or deed of trust contains two distinct provisions as to the power of the trust company, in case of default of payment by the railroad company, found in articles 12 and 13 of the conditions of the instrument. Article 12 begins as follows:

"In case default shall be made in payment of any interest upon either of said bonds when the same becomes due and payable, or in payment of any sum or sums of money hereinbefore provided to be made for the creation of said sinking fund, and such default shall continue for six months after the same has been demanded, the whole principal sums mentioned in each and all of said bonds then outstanding shall, at the option of holders of a majority in interest of said bonds, become forthwith due and payable; and in such case it shall be lawful for said party of the second part, [the trust company,] its successor or successors, to enter upon all and singular the railroads, property, and premises hereby conveyed, or intended to be conveyed, and to have, hold, use, and operate the same, until the same shall have been sold or otherwise disposed of," etc.

The provision as to what the trustees may then do is very full, and the power conferred very great.

But, without elaborating the matter, I am of opinion that the words "in such case," referring to a state of case in which the power of

entry and possession depends, mean the case in which there has been a default in the payment, and on the declaration by the majority of the bondholders that the whole of the sums secured by the bonds and the mortgage has become due, according to the option, the holders have to do so. Then, and not till then, do all these extraordinary powers in the trustee begin, and the remedy for a mere default in paying interest is found in section 13. It is as follows: "In case default be so made and continued as aforesaid, that is, for six months after demand, the party of the second part, its successor or successors in trust, may also, and upon the written request of the holders of at least one thousand of such bonds then outstanding, amounting to one millions of dollars, shall foreclose this mortgage by legal proceedings," or sell or cause it to be sold at auction in the city of New York, etc. Both these sections contain specific directions for the execution of the powers which they confer; but these powers arise, under the first clause, when there is a default, and a majority of the bondholders declare the whole debt due; and, under the second clause, when there is a default, and the holders of a thousand bonds of a million of dollars in amount may demand foreclosure in court, or by sale of the trustee at public auction in the city of New York.

Neither of these events has occurred. There has been no exercise, or attempt to exercise, the option of declaring all the bonds to be due, nor has there been any demand by any of the bondholders or the trustee to foreclose the mortgage by either of the modes mentioned. I can see no right, under this mortgage, in the trust company to take or to hold possession of the road.

As regards the agreement of the parties (of March 1, 1876) under which the actual possession was taken, I cannot recite it here. *It was made plainly for the benefit of the railroad company, to prevent the necessity of a foreclosure of the mortgage* by either of the modes pointed out in the instrument, and the period of six years, to which the possession was limited, was intended to give the company that much time to retrieve its condition, and resume payment of its interest. During this time the road was to remain under the control of the trust company, and no foreclosure was to be had if the company's revenue could pay the reduced rate of interest. If this could not be done, or if, at the end of six years, the railroad company could not resume them, and maintain the future payments of its interest installments, the parties were remitted to their rights under the original mortgage.

The business of the road has been so conducted that, with the aid of the increase of general prosperity, all the secondary or subsidiary mortgages and claims against the company have been paid or arranged, so that nothing is due and unpaid except parts of the two last installments of interest on the first mortgage bonds. There is in the hands of the trust company a large sum of money (say \$300,000) applicable to this payment, and the company, being now pros-

perous, offers to pay and tenders the balance. Must the trust company keep the possession for two years longer, under these circumstances, or should they accept the money, pay off the coupons, and return the road to the possession of the owners? I think that the condition being for the benefit of the railroad company, it can waive the remaining two years of the agreement, and, when all that is due is paid, they are entitled to the possession of their property.

It is suggested that the trust company owes a duty to what is called the second or income bondholders, which requires them to hold the possession. But that instrument has no provision for possession of the road until default, and there has been none here. It only covers the net income, after payment of the expenses and interest on prior mortgages, and its only remedy is that no dividend can be declared until the interest on it is regularly paid. I can see no right of the trust company to hold for these bonds.

It is also said that there is no such security that the railroad company will be able to continue the future payment of its interest as the agreement contemplates. I am of the opinion that in this counsel is mistaken; that the admitted facts, with the written instructions of the advisory board, which was organized under the agreement for the purpose of advising in just such case as this, are sufficient warrant for a surrender of the property.

Let a decree be drawn in accordance with this opinion.

---

**ROYSTER and another v. ROANOKE, N. & B. S. B. Co. and others.**

*(Circuit Court, E. D. North Carolina. January, 1886.)*

**FIRE INSURANCE—DOUBLE INSURANCE—INSURANCE BY OWNER AND BY CARRIER.**

Where owners of certain cotton ship it by a carrier, and obtain insurance on it, and the carrier, at the time, has annual policies covering the cargoes of its steamer, which policies contain a clause limiting the insurance to the interest of the insured, and a fire occurs, this does not constitute double insurance, and the shipper's insurers cannot make the carrier's insurers contribute to their loss.

**In Chancery.**

This is a suit in chancery by the plaintiffs on behalf of their insurers, the Union Insurance Company, against the defendant, to compel it and its insurers to contribute to a loss under the following circumstances: The steam-boat company is a common carrier. It received from the plaintiffs certain cotton for transportation on its steamer Commerce. The said steamer, with her cargo, was destroyed by fire. No negligence in the matter was charged. The plaintiffs had insurance on their cotton in the Union Insurance Company, which paid them \$3,900 on their loss. The steam-boat company also had

insurance to the amount of \$10,000 in policies dated January 27, 1883, and running a year, made payable to the steam-boat company for the benefit of whom it might concern. They were not floating policies, covering the goods on the special trip during which the fire occurred, but policies covering many goods on many trips. The fire occurred on December 6, 1883. After the fire, the steam-boat company compromised with its insurers by collecting \$4,060.89, and applying it to the reimbursement of those of its shippers who were uninsured. This suit is brought by the plaintiffs, for the benefit of their insurers, against the steam-boat company and its insurers, claiming that there was double insurance, and that the plaintiff's insurers can make the insurers of the steam-boat company contribute to their loss. The only defendant insurers who have been served with process, and answered, are the Royal Insurance Company and the London & Lancashire Insurance Company, each of whom paid \$1,015.22 under the circumstances above mentioned. The material portion of the policies of the defendant companies (taking the Royal as a sample, as they were all identical except as to names and amounts) is as follows:

"The Royal Insurance Co., \* \* \* in consideration of \$50, \* \* \* do insure the *Roanoke, N. & B. Steam-boat Co.*, against loss or damage by fire, to the amount of \$2,500, the property hereinafter described: *On all goods, wares, and merchandise generally, including cotton in bales,—their own, or in their care or custody as common carriers or warehousemen,—while in transit on board their steamer Commerce.* \* \* \* *Loss, if any, payable to said company for account of whom it may concern.* \* \* \* And the said \* \* \* company hereby agree \* \* \* to make good unto the said assured \* \* \* all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire," etc.

That portion of the above in italics was in writing, the balance was in print.

*Richard Walke and Walter Clark*, for complainants.

*Robt. M. Hughes*, for defendants.

BOND, J. This cause was submitted on the bill, answer, and exhibits, with an agreed statement of facts therein, and was argued by counsel.

The court is of opinion that the complainants are not entitled to recover. The complainants shipped, on board the defendant's steam-boat, 78 bales of cotton. The steam-boat with all its cargo was destroyed by fire. The complainants had insured, as owners, the cotton in their own names, to the extent of their estimate of its value to them. The defendant company had a policy for a year covering all cargoes on board, limiting the liability of insurers to the extent of the interest of the insured in the cargo. The steam-boat company had no interest in the complainant's cotton, and, when it was consumed, was paid nothing on account of its loss. The company was under no obligation to insure its cargoes, and did not do so further

than to protect its interest for freight, charges, and loss accruing from the negligence of its employees. This is not double insurance, which makes a proper case of contribution between the several insurance companies. To make such a case, the property insured and the interest insured must be identical. A decree will be signed in accordance herewith.

---

GLENN, Trustee, etc., v. SPRINGS and others.

(Circuit Court, W. D. North Carolina. December Term, 1885.)

1. CORPORATION—DECREE AGAINST—EFFECT AS TO STOCKHOLDERS.

Except in the case of fraud, a decree against a corporation is conclusive against a stockholder thereof, even though there was not personal service upon him.

2. SAME—CHANGE OF NAME—STOCKHOLDERS, HOW AFFECTED.

The change of the name of a corporation does not relieve the stockholder of liability.

3. SAME—BOOKS—EVIDENCE AS TO SUBSCRIBERS TO STOCK.

The books of a corporation are *prima facie* evidence of subscription by those whose names appear thereon as owners of stock.

BOND, J. The above suit was brought to recover an assessment of 30 per cent. upon the stock subscribed for by defendant in the National Express & Transportation Company, incorporated by the legislature of the state of Virginia in the year 1865; the said assessment having been made upon the stock and stockholders of said company by the chancery court of the city of Richmond, in a suit therein pending by Glenn, administrator, and others, creditors, against the said corporation.

This court is of opinion that most of the matters set up as defenses cannot avail these defendants, because the decree, rendered on the fourteenth day of December, 1880, by the chancery court of the city of Richmond, is conclusive against a stockholder, although there was no personal service upon him, unless fraud in obtaining the decree is shown, and no fraud in this case has been alleged. Mor. Corp. 619; Abb. Corp. 403, 405-407.

Now the decree is decisive—*First*, as to the fact that there was no laches upon the part of the corporation or its trustees previous to the signing of the decree; *secondly*, as to the statute of limitations; *thirdly*, as to the existence of *bona fide* debts against the company; *fourthly*, as to informalities in the incorporation; and, *fifthly*, as to the want of power in the trustee to make the call. Mor. Corp. 144, 145; *Upton v. Tribilcock*, 91 U. S. 45, 55. All these defenses are precluded by the decree.

Now the decree also settles the question that the mere change of name from the National Express Company to the National Express & Transportation Company does not avoid the liability of the stock-

holder. *Thomp. Liab. Stockh.* § 111; *Blackburn's Case*, 8 De Gex, M. & G. 177.

The defenses not covered by the decree are not sufficient to prevent a recovery by the plaintiff, for it is well settled that the books of a corporation are *prima facie* evidence of subscription by those whose names appear thereon as owners of stock. *Turnbull v. Payson*, 95 U. S. 418. So, also, it is well settled that the substituted trustee is the proper plaintiff in a court of law. *Glenn v. Williams*, 60 Md. 93; *Sanger v. Upton*, 91 U. S. 58; Code Va. c. 174, § 8.

The call in this case was made by the Richmond court on the fourteenth day of December, 1880. The writ issued on the sixteenth day of November, 1883. Three years not having elapsed, the statute of limitations is no bar on account of the lapse of time since the signing of said decree. *Western R. Co. v. Avery*, 64 N. C. 491 *et seq.*

The defenses being disposed of, the case is simply this: A stockholder owning 80 per cent. of his subscription asked to be relieved from liability, although the record shows that there are meritorious creditors of the company unpaid. No sufficient reason has been given why this defendant should be relieved from his contract.

Let judgment be entered for the plaintiff.

---

PEAKE, Adm'r, *v.* BALTIMORE & O. R. Co.

(Circuit Court, S. D. Ohio. January, 1886.)

TORTS—INJURY CAUSING DEATH AND DAMAGE TO PROPERTY—WHEN TWO SUITS MAY BE BROUGHT—RES ADJUDICATA—EXECUTORS AND ADMINISTRATORS—REV. ST. OHIO, §§ 6134, 6135.

Where there was a collision with defendant's train, by which the intestate was killed and his horses and wagon were destroyed, *held*, that a suit by the administrator, under the Revised Statutes of Ohio, §§ 6134, 6135, to recover damages for the death of the intestate, is not barred by the former recovery of the value of the horses and wagon, in another suit by the administrator.

On Demurrer.

By a collision with the defendant's train at a crossing, the intestate and his two horses were instantly killed, and his wagon was destroyed. The administrator brought two suits in the state court; one for negligently killing the intestate, and the other for negligently destroying his property. There was a judgment in the latter case for \$450; afterwards a plea was filed, setting up that recovery and its satisfaction in bar of this case, and there was a reply stating the facts to which this demurrer was filed; and subsequently the cause was removed to this court.

*Converse, Booth & Keating* and *Outhwaite & Lynn*, for plaintiff.  
*J. H. Collins*, for defendant.

HAMMOND, J. It was by the statute 4 Edw. III. c. 7, which has the force of common law with us, and through its enlarged construction by the courts, that injuries to personal property could be redressed, after the death of the owner, at the suit of the executor or administrator. See Rev. St. Ohio, § 4975. That statute almost abrogated, so far as it concerned personal property, though perhaps not quite as fully as our modern statutes have done, the maxim that personal actions die with the person; but it left the maxim in all its force as to injuries to the person until quite recent times. In this condition of the law, and prior to our own modern statutes giving a remedy after death even for injuries purely personal, there was a struggle, through the various forms of action, to redress these latter injuries, notwithstanding the obnoxious maxim, by bringing some action sounding in contract rather than tort; and, on the other hand, certain actions upon contracts, but sounding in damages,—as, for example, *assumpsit*,—were sought to be excluded from the common-law advantage of survival for all actions upon contracts. The modern abolition of forms of action has increased the complications of the subject; but everywhere traces of the influence of the nice discriminations of the old special pleadings can yet be found, and the distinctions between actions *ex contractu* and *ex delicto*, like those between law and equity, so inhere in the fiber of our law that it seems impossible to be rid of them. Schouler, Adm'r, §§ 277-284; 1 Williams, Ex'rs, (4th Amer. Ed.) 664, 669, *et seq.*; 1 Wms. Saund. 216, note; Cooley, Torts, 262; 2 Add. Torts, 1111; Broom, Leg. Max. (7th Ed.) 904-916; *Twyecross v. Grant*, 4 C. P. Div. 40, 45; *Kirk v. Todd*, 21 Ch. Div. 484, 488; *Alton v. Midland Ry. Co.*, 19 C. B. (N. S.) 213; *Bradshaw v. Lancashire R. Co.*, 10 C. P. 189; *Blake v. Midland Ry. Co.*, 18 Adol. & E. (N. S.) 93.

There is in this case, since there is no relation of passenger to carrier or other contract between the parties, no element except of pure tort; unless, if necessity required, the principles of the old law might be invoked,—as in the case of the parson, for dilapidations, mentioned in Saunders,—to raise a contract by reason of a duty to be performed by this railroad company in so managing it that every person crossing its track should be safe from injury; this obligation or duty arising as a consideration for the franchise of operating a railroad at all. But, happily, we do not now need to resort to such niceties to save a manifest right denied by a maxim which never had any sense in it, after the law, having advanced beyond the stage which gave all a man's property to the first taker, when he was dead, allowed wills to be made and administrators to be appointed to transmit his property to the next of kin, when his debts should be paid. The early recognition of *choses in action* as property capable of transmission was nothing more than the acknowledgment of the survival of a right to sue; but this is not strictly comprehensible, for the reason that a cause of action has no life, and cannot die, as the maxim says it



does. Therefore, discarding the fictions of which the law is sometimes fond, it may be truly said that when a man dies the law takes hold of his property and vests the subsequent ownership in whomsoever it pleases, according to its wisdom. Being dead, a man can no longer be a litigant in court, and the law therefore appoints some one to act in his stead and exercise the power he had to redress his injuries, be they what they may, with such limitations as its wisdom may impose. We now have, because of rules that have become familiar, only a faint notion of the latitude that legislation may take in giving directions as to what shall be done with a dead man's property, and how the injuries—I mean in the broadest sense—he has sustained may be redressed by others appointed to redress them; these two things being in the end only one,—the distribution of his property, namely: for that compensation due him as damages for injuries sustained either to person or property, although in the hands of an adversary who denies the dead man's claim to it, is, after that controversy is settled, the amount ascertained and satisfaction made, as much tangible property distributed according to his will or according to the directions of the law in lieu of it, as any other.

Now, for a very long time,—indeed, so long that we are apt to forget that it is all by legislative direction,—pursuing the course of nature, and following the indications of human sentiment, the law has permitted the dead man to appoint the persons to take his property, and those who are to take his place as litigants and represent him in that behalf; and, in default of a will to do that, selects those nearest to him in affection as the takers, and appoints some one to represent him in litigation. Quite uniformly, everywhere, it has recognized the claim of creditors to be first paid, and, after this, that the widow and children, and then the next of kin, should take the surplus. Nearly always the executor or administrator must sue or be sued, no matter who takes the proceeds; and the law by a fiction has treated this right of the personal representative to sue as a thing transmitted by the dead man, in the sense that, by a similar fiction, the tangible property is transmitted; but we should not allow this fiction to mislead us in construing statutes like that here. It may be that if, when the decedent died, he had a right to sue, already subsisting and accrued, there was some basis for treating this as *transmitted* by him to his executor or administrator; although, as a matter of fact, as the language of the statute of Edward and all subsequent statutes shows, it is rather the creation in the representative of a new right to sue. But when—as in the case of instantaneous death, (if there be such a thing possible,) or in case of death longer delayed, where the *gravamen* of the action is the injury arising out of the death solely, and not out of the previous suffering—a suit is directed by law, which the decedent previously to his death never had any right to bring, the fiction of any transmission of the cause of action appears more distinctly, and the creation of a new

v.26F.no.7—32

cause of action becomes more marked. Unimportant as this really is, it has a technical bearing which we cannot overlook in cases like this, as we shall presently see.

Again, when the law in recent times took another step forward, as in Edward's reign it had done, and determined that it would abolish the absurdity of offering a premium to crush a man to death rather than crush him less severely, it departed from the original policy of first satisfying creditors out of one's effects, and, as to that kind of assets or property, followed an analogous modern principle of insurance of lives, and gave the proceeds directly to the widow or next of kin, to the exclusion of creditors. Not in every state was this done, but generally. The reason of this seems plain, in view of the law as it stood under the old statute of Edward. There even purely personal injuries could be redressed, *aliunde* any contract relation of the parties, if it were made to appear that, as a direct and proximate cause of the injury, *the personal property of the decedent had been diminished*; and this, notwithstanding death ensued. The statute of Edward gave a right of action in such a case, and it was treated as an injury to the property, and not the person; transmitted to the administrator notwithstanding the death; and the assets for satisfaction of creditors and distribution to the next of kin being lessened thereby, the administrator could sue as for all other assets.

But as to that pain and suffering which does not affect one's property to diminish it, or lessen the assets in the hands of the administrator, and as to the loss of a life, in which creditors have only a remote if any interest, concerning which injuries the man could only sue if he lived, and not at all if he died, the legislature, in its wisdom, concluded that the claims of creditors were not superior, and distributed the proceeds to the widow and children or next of kin. It is true, the administrator sues, though the next of kin may, under some circumstances, also sue directly; but it is none the less the creation of a new cause of action, and not one transmitted; and this is shown by the fact that it proceeds mostly on the theory of compensating the next of kin for *their* loss, and not the decedent, by increasing his estate for administration. The creditors may take the property, but the relatives shall have the other, has been the theory of legislation. It must be admitted, however, that there is a good deal of obscurity about the legislation, and it is difficult to say whether it proceeds on the one theory or the other; for it has commingled injuries which might have been redressed under the old statute of Edward, and possibly some that might have been redressed as being a breach of a contract, even without that statute, and belonging to the general estate for administration, with those that certainly could never have found redress at all, except under the new acts which divert the proceeds from the general estate. It may be that the assets of the estate proper for the benefit of creditors have been somewhat curtailed by this process, but the right of the widow or children or next of kin has been

enlarged much more than the extent of that curtailment. The statutes themselves, particularly those of Ohio, do not make it material to inquire whether it is for the pain and suffering of the decedent, or for that of those for whom the administrator sues, for which the latter recovers; not, at least, as the question is here presented. In either case the money belongs to them, and not to the administrator *qua* administrator for the ordinary purposes of administration of assets. He is not the general trustee for the estate in the usual sense, but a special trustee for the beneficiaries designated by the new legislation, be they whom they may.

This analysis of the sources of the administrator's power to sue, and comparison of the objects sought to be secured by the legislation, old and new, authorizing him to sue, are necessary for a proper understanding and application of the doctrine of *res adjudicata*, invoked by this demurrer. There is much force in the position that when one comes to sue for damages for a particular trespass or tort of any kind, he should, in one suit, demand and show all his damage, whether to person or property; and this, whether he sues in his own behalf or that of another. If he sue for an injury to himself, this could be readily done, for the recovery belongs to him, and it would seem immaterial whether one part is for damage to property and another for damage to the person. So, too, if LORD CAMPBELL'S act, and those of which it is the prototype, had, like that of Edward, merely given the administrator the right to sue, the recovery to go, like other assets, into the estate *qua* estate, it is quite difficult to see why the whole damage to both property and person should not be included in one recovery, or why any tort-feasor should be afflicted with two suits in such a case. Surely, the fact that the right to sue for injuries to property and for certain injuries to the person affecting the property injuriously, was given in Edward's reign, and that the right to sue for injuries purely personal and not affecting the property was given only in the reign of Victoria, should make no difference in that regard. Both are equally the creatures of statute; and if one were the creature of the common law and the other of a statute,—one an old and the other a newly-created cause of action,—there can be no difference in the principle which would forbid two suits for the same tort. Nor does it seem material, in such case, whether the deceased had a cause of action before he died, which has been transmitted by operation of law to his successor, or whether the latter is the first possessor of the right to sue; whether the *gravamen* of the action be the antecedent pain and suffering, or that which is caused simultaneously with death; whether death be instantaneous, if there be such a thing possible, or longer delayed,—for once abolish the fiction that the cause of action dies with the person injured, and the whole matter of redress is open at large to the legislature. It may consider whether the damages due shall go into the general assets of the estate, thereby enlarging the fund for payment of debts, and, after this, for distri-

bution according to will or the statutes of descent and distribution, or whether it shall go to others specially pointed out by the legislation. And here, again, it seems to be a somewhat unnecessary refinement to consider the question whether the legislation is based on the idea of redressing a wrong done to the deceased, or to the statutory beneficiaries,—whether it is his loss or theirs which is compensated by the recovery,—for the legislature, in either case, has the power to abrogate the old law and redress the wrong. But, reasonably, as the statutes are drawn, it would seem to be not *his* suffering, but theirs, which is the ground-work of the action; and, in tracing back the established rule, that no cause of action will lie to a third person for any injury sustained by the death of another, it will be found that it was never satisfactory to the courts, since no very sound reason was ever given for it. *Hall v. Steam-boat Co.*, Thomp. Carr. 205; *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580; 2 Thomp. Neg. 1272.

But with plenary power to redress both the wrong to the deceased, and that resulting to his dependents, the legislature, perhaps without any care for the distinction, has given a broad action for redress; and the new legislation, with that which previously existed, now furnishes a complete remedy for every one. And, apart from these refinements, it is only necessary to consider that long ago the damage for injury to property, either directly, or through injury to the person which resulted in a diminution of the property, was placed by the legislature in the same category as other property, and brought within the policy of the law which determines that all property, with specific exemptions, shall be primarily a fund to pay the debts of the decedent, and only the surplus shall belong to the persons designated in the ordinary statute of descents and distributions. But as to damages purely personal, following a policy which determines that in such assets the creditors are not equitably interested, the new legislation gives the proceeds directly to persons named in the statute,—a special statute of distribution for this particular fund. Now, it is manifest that two suits are required to keep these two funds apart. If one suit were brought, there would be no way to apportion a verdict *in solido*, showing how much was for injury to property, and how much for injury purely personal; since the statute makes no provision for such apportionment, as it might have done. Perhaps it would have been more just to defendants, and more economical to all concerned, to allow one suit, and make provision to have the recovery apportioned by the jury, by the court, by the administrator, or otherwise; but the legislature has not thought so, and *ex necessitate* there must be two suits. Nominally, the parties are the same, and in a broad sense the cause of action and the issues are the same; but in a technical sense none of these conditions exist, as shown by the foregoing reference to the sources of the two suits, and their characteristics, respectively, and the case does not at all come within the familiar requirements of the principle of *res adjudicata*.

The law, in its own wisdom, and in pursuance of its own distinct policies, splits the cause of action. The administrator is the trustee of two distinct funds, for two distinct purposes, and, technically, sues in two distinct capacities, as much as if he represented two decedents, or as if the legislature had appointed some other agent to bring the personal injury suit rather than himself. This is plainer under the Ohio statute, as amended, than some others, perhaps, and plainer in this case than it might be in some others, where the alleged injury to the property or general assets was not so direct and patent as it is here. Rev. St. Ohio, 6135; 77 Laws Ohio, p. 207, (Act April 30, 1880;) *Steel v. Kurtz*, 28 Ohio St. 191.

Cases elsewhere support this judgment. In England it has been held, not only that an administrator may bring two suits, as here suggested he must, but also that one who has been injured both in property and person may, even while living, bring two suits, but not without substantial protest in the latter case. *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599; *Brunsdon v. Humphrey*, 10 App. Cas.—; S. C. 24 Amer. Law Reg. (N. S.) 369, and note; S. C. 11 Q. B. Div. 712; *Bradshaw v. Lancashire & Y. Ry.*, *supra*; *Blake v. Midland R. Co.*, *supra*; S. C. 83 E. C. L. 93; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

The first of these cases is directly in point, only the case at bar is more plainly within its ruling, and it is the only case disclosed by the diligence of counsel or my own which is so; but the others sustain the reasoning of that case, and I have endeavored to show the soundness of the judgment; and that, whatever may be said of bringing, while one is living, two suits for the same tort to person and property, there can be no objection, under existing statutes, to two suits by his administrator; indeed, there must essentially be two suits for the reasons I have stated, if for no other.

Demurrer overruled.

---

### KIRK and others v. MILWAUKEE DUST COLLECTOR MANUF'G Co.<sup>1</sup>

(Circuit Court, E. D. Wisconsin. October, 1885.)

#### 1. CONTEMPTS—FEDERAL COURTS—JURISDICTION.

Where a cause has been removed from a state to a federal court, pending an application to punish one of the parties for contempt by disobeying an order of the state court, the federal court has no jurisdiction to hear and determine such application.

#### 2. SAME—REV. ST. § 725.

The sole power of the federal courts to punish for contempt of their authority both at law and in equity is derived from section 725 of the Revised Statutes, and they cannot impose penalties under the state statute, in the form of pecuniary indemnity to the party injured.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

3. SAME—NATURE OF CONTEMPT PROCEEDINGS IN FEDERAL COURTS.

A contempt proceeding in the federal courts is in its nature criminal, and must be governed by the rules of construction applied in criminal cases.

4. SAME—REMOVAL ACT OF MARCH 3, 1875.

It is a general and elementary principle that that court alone in which a contempt is committed has power to punish it or to entertain proceedings to that end; and the removal act of March 3, 1875, does not empower a federal court to inquire into an alleged contempt of the state court committed before the case is removed.

5. SAME—SECTIONS 4 AND 6 OF THE REMOVAL ACT CONSTRUED.

The provisions of sections 4 and 6 of the act of March 3, 1875, point to all such proceedings and orders as have relation to the prosecution and defense of the suit in due course, and the ultimate results aimed at in the litigation.

In Equity.

*Flanders & Bottum and Quarles & Spence*, for plaintiffs.

*Cotzhausen, Sylvester, Scheiber & Sloan*, for defendants.

DYER, J. This is a suit removed from the state court to this court.

The prayer of the complaint is that a certain license granted to the defendant by the plaintiffs May 1, 1883, for the manufacture and sale of certain patented machines known as dust collectors, may be decreed to be canceled and annulled on the ground that the defendant has violated certain conditions of the license, and that the defendant may be enjoined from further manufacturing and selling said machines. The answer of the defendant controverts the allegations of the complaint, and, as is permissible under the code practice, sets up an equitable counter-claim in which it is asked among other things that the plaintiffs be enjoined, *pendente lite*, from engaging in or resuming the manufacture and sale of the dust collectors covered by the license, and from slandering the title of the defendant acquired by said license, and from committing any acts in violation of the alleged rights of the defendant as licensee.

After issue was thus joined, the state court, on application of the defendant, granted a temporary injunction restraining the plaintiffs "from engaging in or resuming the manufacture and sale of dust collectors within the United States in so far as exclusive license was vested in the defendant under the agreements mentioned in the pleadings and under the letters patent set forth in the answer, and also from slandering the title of the defendant to manufacture, sell, and license dust collecting machines under said letters patent, or in any way questioning or controverting the right of the defendant to manufacture and sell said machines, and from all attempts to divert the good-will and patronage of the defendant to themselves or into other channels." This injunctive order was granted June 6, 1885, and, as originally entered, was to remain in force until June 20th. On the twenty-fifth day of June a further order was made continuing the injunction in force until the final hearing of the cause.

Subsequently, and before the removal of the case to this court, it being claimed by the defendant that the plaintiffs were violating the injunction, an order was obtained that the plaintiffs show cause on the

first day of September, 1885, why they should not be punished for contempt in disobeying said injunction. This order was served on the plaintiffs Bean and George T. Smith Middlings Purifier Company, and on one Faustin Prinz, who was alleged to be a party to the violation of the injunction. On the first day of September, and before the contempt proceedings were heard by the state court, the case, on the petition of the plaintiffs, was removed to this court under the removal act of March 3, 1875.

An entry in the record indicates that the defendants' counsel sought to have the judge of the state court dispose of the pending application to punish the plaintiffs for contempt, before the transfer of the case to this court was ordered, but he refused to entertain or pass upon the contempt proceeding.

After the case came to this court, on *ex parte* motion of the defendant, a time was fixed for hearing the application thus made in the state court to punish the plaintiffs for contempt, and a further order to show cause addressed to the plaintiffs Kirk and Fender, similar to that made by the state court, was entered, which, with the affidavits thereto attached, was served upon Kirk, but not upon Fender. As the plaintiffs are all non-residents of the state of Wisconsin, service of the orders to show cause was made upon such of them as were served, out of the state. When this matter came on for hearing, a question *in limine* arose as to the authority and jurisdiction of this court to entertain the contempt proceeding or to proceed to judgment therein, it appearing that the acts complained of, which constituted the alleged contempt, were committed while the case was pending in the state court and before its removal to this court; it being contended that this court did not, by virtue of the removal of the principal case, acquire authority to punish the plaintiffs for their alleged disobedience, before the removal, of the injunctive order of the state court. The court directed this question to be orally argued at the bar, and after very able arguments on both sides, this is the question to be now decided.

A section of the state statutes (Rev. St. Wis. § 2565, c. 117) provides that every court of record shall have power to punish, as for a criminal contempt, persons guilty, among other things, either of disorderly, contemptuous, or insolent behaviour committed during its sittings, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impede the respect due its authority, or any breach of the peace, noise, or disturbance directly tending to interrupt its proceedings, or willful disobedience of any process or order lawfully issued or made by it, or resistance willfully offered by any person to the lawful order or process of the court. And the same statute provides that any such contempt shall be punished by fine not exceeding \$250, or imprisonment not exceeding 30 days, or both. Another enactment in the same Revision (Rev. St. Wis. c. 150) entitled "of proceedings to punish contempts to protect the rights

of parties in civil actions," provides that "every court of record shall have power to punish by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in an action or proceeding depending in such court \* \* \* may be defeated, impaired, impeded, or prejudiced, in the following cases;" one of which enumerated cases is that of "parties to actions \* \* \* and all other persons \* \* \* for any \* \* \* disobedience to any lawful order, judgment, or process of such court," and "all other cases where attachments and proceedings as for contempt have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party, or to protect the rights of any such party." Section 3490 of this chapter provides that "if an actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine upon such defendant. \* \* \* Where no such actual loss or injury has been produced, the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings, and in no case can the imprisonment exceed six months."

The power of the federal courts to punish for contempts is derived from section 725 of the Revised Statutes of the United States, which provides that "the said courts shall have power \* \* \* to punish by fine and imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts *shall not be construed to extend to any cases except the misbehavior of any persons in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.*"

The last clause in section 4 of the removal act of March 3, 1875, provides that "all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." And section 6 of the same act provides that "the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal."

Before considering what effect is to be given to these provisions of the act of March 3, 1875, it is to be observed that the state statutes, as we have seen, provide either for the punishment of a party who disobeys a lawful order of the court as a criminal contempt, or for punishment in the form of pecuniary indemnity to the party injured by



the misconduct which constitutes the contempt; and in the latter class of cases the punishment may indirectly tend to promote the rights and advance the remedies of the party to the action thus injured. The sole power of the federal courts to punish for contempts of its authority both at law and in equity is derived from section 725 of the Revised Statutes. It was argued by the senior counsel for the defendant that such power was inherent in a court of equity, and not dependent upon the statutory provision on the subject; and in his discussion of the question he made a clear and forcible statement of the powers of a court of equity as those powers were originally exercised. But it will be observed that while the statute of the United States is in a certain sense declaratory of an inherent power in the federal courts to punish for contempts, it is restrictive and limits the exercise of that power to certain well-defined classes of cases. That it includes the exercise of this power by a court of equity is evident from the use of the words "order, rule, *decree*," and the rules of practice for the courts of equity bearing upon this question, and referred to by counsel, were adopted in subordination to the statute which had its origin in 1831.

In *Ex parte Robinson*, 19 Wall. 510, Mr. Justice FIELD said:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of congress of March 2, 1831. The act, in terms, applies to *all courts*. Whether it can be held to limit the authority of the supreme court, which derives its existence and powers from the constitution, may be perhaps a matter of doubt; but that it applies to the circuit and district courts, there can be no question. These courts were created by act of congress; their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

Congress having legislated upon the subject of contempts, and the federal courts having derived their sole power to punish for contempts from the act of congress, (Rev. St. § 725,) it follows irresistibly that the state court practice in such cases cannot be followed here. Putting out of view for the moment the effect of the provisions of the removal act of March 3, 1875, which have been quoted, it is perfectly clear under all the adjudications that a contempt proceeding in the federal court is in its nature criminal, and must be governed by the rules of construction applied in criminal cases. *New Orleans v. Steam-ship Co.*, 20 Wall. 392; *In re Ellerbe*, 13 Fed. Rep. 532, where it is said that contempt of the authority of a federal court "has frequently been held to be an offense against the United States, within the terms of the provision of the constitution which authorizes the president to pardon such offenders;" *U. S. v. Atchison, T. & S. F.*

*Ry. Co.* 16 Fed. Rep. 853; *U. S. v. Berry*, 24 Fed. Rep. 783; *In re Mullee*, 7 Blatchf. 23. Such it appears to be well settled, is the character of proceedings to punish for contempt in the federal courts. Proceeding a step further, it is a general and elementary principle, in support of which authorities are not needed, that that court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it, or to entertain proceedings to that end. *Ex parte Bradley*, 7 Wall. 364-372; *Lessee of Penn v. Messinger*, 1 Yeates, 2; *Passmore Williamson's Case*, 26 Pa. St. 9; *Rapalje*, Contempts, § 13.

From the foregoing it follows that in the absence of any provision in the act of March 3, 1875, giving to this court the power now invoked, it would be without power to inquire into or deal with the alleged contempt. This would be so because of the general principles that have been stated. The question then is, and upon this point the contention hinges, do the clauses in sections 4 and 6 of the act which have been quoted, mean that, upon the removal of a case from the state court, a pending and unadjudicated contempt proceeding comes with it, and that the United States court shall have the power to take up that proceeding and punish the party, if guilty, for his violation of the order and contempt of the authority of the state court? It was insisted on the argument that this question was determined by this court in favor of the exercise of such power in *Williams Mower & Reaper Co. v. Raynor*, 7 Biss. 245. In this counsel are in error. There the state court had made an order that the defendant deliver to the plaintiff, to enable him to prepare his pleading, sworn copies of entries in the defendant's books and of certain writings alleged to be in his possession. The defendant disregarded the order and was attached for contempt. An inquiry being instituted, he was adjudged guilty of misconduct, and was ordered forthwith to deposit the books and writings in court, and to pay to the plaintiff the costs of the proceeding, and to stand committed until the order was complied with. Here the party had been adjudged guilty of the contempt and the penalty had been imposed. The court whose order had been disobeyed had pronounced the punishment, and thereby asserted its authority, and in that state of the record the case came to this court. It was held that that proceeding was a step taken in the principal action to secure the production of the books and papers for the benefit of the plaintiff, and stress was laid upon the point that the proceeding did not therefore rest wholly in the defiance of the authority of the court. "It necessarily involved," said the court, "the enforcement of a civil remedy to which it had been adjudged the plaintiff was entitled in the action, and the protection of an alleged right of the plaintiff for the purpose of enabling him to proceed therein." It by no means follows from that decision, if the order of the state court in that case had been purely penal, made for the sole purpose of vindicating the authority of the court, that this court would have taken

it up and proceeded to enforce it. Even less does it follow, if the proceeding had been one purely of contempt of the state court affording no direct relief to the plaintiff in promotion of his action, and had been undetermined at the time of removal, that this court would have exercised jurisdiction of the proceeding. The provisions of sections 4 and 6 of the act of March 3, 1875, point to all such proceedings and orders as have relation to the prosecution and defense of the suit in due course and the ultimate results aimed at in the litigation. They relate to all such steps as have been and may be taken towards securing the ultimate relief sought; that is, that the case shall go on as if originally commenced in the court to which it is removed, and that the proceedings already taken in advancement of the suit shall stand as if taken in that court. This I believe is the general understanding of the courts of the meaning of these provisions.

It is contended, however, that the contempt proceeding was auxiliary to the main action, and was of a civil nature and taken in promotion of a civil remedy. That is true to the extent that the state court had the power to inflict punishment in the form of pecuniary indemnity to the party injured. But how can this court deal with it, if at all, except as a proceeding of a criminal nature under section 725? And in that case it would simply punish as the statute directs, by fine or imprisonment, for acts done in derogation of the authority of another court, when the suit was pending in that court. A power so extraordinary should be clearly given before it is exercised. In the present state of decision I regard the proposition as indisputable that this court, if it were to attempt to take jurisdiction of this proceeding, could not administer penalties according to the state statute. It would have to be treated as a purely penal proceeding. I conceive this to be the logic of the decision of the supreme court in *Ex parte Fisk*, 113 U. S. 713, S. C. 5 Sup. Ct. Rep. 724. It was there held that as congress had legislated generally on the subject of evidence, and had conferred no authority to compel the examination of a party before trial, but on the contrary had declared that oral testimony should be taken in open court, an order for such examination made by the state court before the removal of the cause could not be enforced by the United States court. Analogous to this is the state of the case here. Congress having legislated on the subject of contempts and made a prosecution for contempt a purely penal proceeding, with no provision for pecuniary indemnity to a party injured, this court is under the restraint of the federal statute, and cannot enforce the state statute. Thus the remedial character of the proceeding is taken away. There are, it is true, some cases originally brought in the federal courts in which those courts have attempted to adopt a practice analogous to that authorized by the state statutes in imposing penalties in contempt proceedings for the benefit of a party to the suit. But in two of the cases which have served as precedents for such a proceeding, the validity of the practice is not dis-

cussed. *In re Mullee*, 7 Blatchf. 23; *Doubleday v. Sherman*, 8 Blatchf. 45. See, also, *Searls v. Worden*, 13 Fed. Rep. 716. In *U. S. v. Atchison, T. & S. F. Ry. Co.*, *supra*, Judge McCrARY held that the purpose of a proceeding to punish for contempt "is not to afford a remedy to the party complaining, and who may have been injured by the acts complained of. That remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the court. In such a proceeding the court has no jurisdiction to make any order in the nature of further directions for the enforcement of the decree;" citing authorities in support of his conclusion. This I think is the sound view. "Section 725," says the supreme court, in *Ex parte Robinson*, *supra*, "is a limitation upon the manner in which the power may be executed, and must be held to be a negation of all other modes of punishment."

In *Fanshawe v. Tracy*, 4 Biss. 497, Judge DRUMMOND said:

"A party who has conducted himself in such a way as to justify the court in punishing him for contempt, or for disobedience of its order, has committed an offense against the United States. The court is the mere instrument or organ of the government in punishing the person for the offense which he has committed. \* \* \* If he is imprisoned by order of the court, it is the act of the United States. The United States is the custodian of his person. If he is fined by the court, the fine goes to the United States; and although it may be a proceeding growing out of a civil action, it is distinct in its character in many of its essential particulars. The parties may not have, do not have, absolute control over the proceedings. The United States is the party to the proceeding, and not the mere defendant or plaintiff upon the record."

See, also, *U. S. v. Berry*, 24 Fed. Rep. 783. To the same effect are the adjudications in *New Orleans v. Steamship Co.*, *supra*; *Passmore Williamson's Case*, *supra*, and *First Cong. Church v. Muscatine*, 2 Iowa, (Cole's Ed.) 69. This proceeding, therefore, if prosecuted here, would be one on the part of the United States in a court of the United States to punish for a contempt of the authority of a state court.

Since the nature and purpose of proceedings to punish for contempt in the federal courts are such as have been pointed out, is it a sound construction of the act of March 3, 1875, to hold that it was intended by that act to give to the court to which a suit has been removed, the authority, and to impose upon it the duty, of taking cognizance of a proceeding pending and undetermined in the state court at the time of removal, for the punishment of a party who had been guilty of a contempt of that court? Can such be held to be the intention of the act in view of the fact that the proceeding, if entertained here, must be purely penal in its character, and is nothing less than the imposition of punishment by one court for an offense committed against the authority of another court? Upon deliberate consideration I am of the opinion that it was not intended by that act that this court should exercise such a power. The right to take jurisdiction over such a proceeding should be clear, to justify its ex-

ercise. If there is grave doubt of the authority of the court, it may well pause at the very threshold of the proceeding. The jurisdictional right should be clear, not doubtful, especially as the power invoked is extraordinary.

It was suggested by the junior counsel for the defendant—and the suggestion seemed at the time not without force—that the only question now requiring consideration is whether the court has not the right to institute inquiry upon the orders to show cause, as disconnected from the question of punishment, if the parties should be found guilty. But this controversy, even at its present stage, really involves ultimate results, and it would be labor without profit to go into the inquiry at all if it is evident that in the end the court will be without power to take final action.

As a result of the views expressed, the court is of opinion that it should decline to proceed with the proposed inquiry into the alleged misconduct of the plaintiff before the case was removed to this court, for want of jurisdiction, and that the order to show cause granted by this court should be vacated.

---

### UNITED STATES v. PATTERSON.

*(Circuit Court, W. D. Tennessee. February 11, 1886.)*

#### CONTEMPT—STRIKING AN ATTORNEY DURING RECESS.

It is a contempt to strike an attorney in the court-room, although the judge be not on the bench and the court be in recess, and although the cause of the assault have no relation to the proceeding in which the attorney is engaged.

During a session of the court, and while a jury case in which Newman Erb, Esq., a member of the Memphis bar, was engaged as counsel, an intermission or recess of one hour was taken. Just after the presiding judge had come down from the bench, but before he or all the jurors and witnesses in attendance had left the court-room, and before Mr. Erb had retired from the bar, the respondent, Patterson, entered, and approaching, struck Mr. Erb, when further violence was at once prevented by those standing about. Upon the convening of the court, the following order was made of its own motion, and duly entered of record:

"It coming to the knowledge of one of the judges of this court, by his personal observation and otherwise, that immediately upon the taking of the noon recess, on Tuesday, February 9, 1886, M. R. Patterson, a citizen of Shelby county, Tennessee, committed an assault, by striking in the face, upon Newman Erb, Esq., in the court-room of this court, and at the bar thereof, the said Erb being then and there engaged as an attorney of one of the parties in a suit the trial of which was in progress at the time of taking the recess; it is therefore ordered that the said M. R. Patterson appear before this court on Wednesday, February 10, 1886, at 10 o'clock A. M., at the court-

room, in the city of Memphis, then and there to show cause, if any he can, why he should not be punished for a contempt of this court. It is further ordered that the marshal serve a copy of this order upon said Patterson, and that the district attorney appear and prosecute this proceeding in behalf of the United States."

This order was duly served as directed, and the marshal's return is on file evidencing the service.

The respondent, in obedience to the order, appeared and filed the following answer under oath:

"In answer to the order to show cause why he should not be punished for contempt, respondent, M. R. Patterson, says that soon after coming to his office, on Tuesday morning, his attention was called to a communication from Newman Erb, Esq., in the *Appeal* of that date, a leading journal in the city of Memphis, severely reflecting upon the character of respondent's father, who was absent from the state. Respondent immediately sent for the paper containing said communication, which appeared to respondent to have been prepared with great care, and to be a deliberate and willful assault upon the good name and integrity of respondent's father. Respondent felt it his duty to resent this assault, and it was not his purpose to commit severe bodily harm, but to resent it by a blow with his hand. With this view respondent went to the custom-house, in which the circuit court of the United States was in session, intending quietly to remain in the marshal's office until the adjournment of court, and then resent the affront in the manner stated above. Accordingly he went to the marshal's office, where he had been quietly sitting for nearly two hours, when one of his partners came from the court-room, and respondent learned from him that the court had adjourned. His partner had in some way not known to respondent learned of his purpose, and they remained for a short time in conversation, his said partner endeavoring to persuade him to think further of the matter before acting. In this way respondent was detained for some time after he had been informed that court had adjourned, and was satisfied that his honor, the presiding judge, had left the bench and retired from the room, and he thought it probable that Mr. Erb had also gone. On entering the court-room from the marshal's office respondent discovered that Mr. Erb had not gone, and went immediately towards him, addressed him so as to call his attention, and slapped him with his hand. At the time of this occurrence respondent was not aware of the presence of the presiding judge, and believed after he had retired from the bench and adjourned the court that he had also left the room. Respondent has high personal regard for the presiding judge, and a deep sense of the importance of order and decorum in courts of justice, and could not be induced, intentionally, to do an act that would manifest want of respect for his honor, or that would infract, in the slightest, a proper observance of such order and decorum. He meant no contempt. If guilty, technically, it was without design, and respondent shall feel a profound and keen sense of regret and sorrow if, unintentionally, he has done an act that amounts to contempt of court. Respondent again repeats that, in discharging what he believed to be a duty due from him, he was solicitous not to commit a contempt of court, and thought he had so acted as not to offend in that regard. Having fully answered, respondent prays to be hence dismissed."

*John B. Clough*, Asst. Dist. Atty., for the United States.

*George Gentt*, for respondent.

HAMMOND, J. It is a rude discourtesy to a court, and a grave attack upon the dignity of the authority to which the court belongs, to use its court-room as fighting ground, under any circumstances, even

though the court be in recess and the judge not upon the bench. The circumstances of this case show that the respondent had no intention or thought of any incivility to the court or the judge, and the cause of the rencounter had no connection, near or remote to the court, or any of its proceedings. The mistake of the respondent was in assuming that when the judge left the bench he might, so far as the court was concerned, proceed to accomplish his purpose of making the assault, supposing that it was only when the judge was upon the bench that any question of contempt could arise. But it must be apparent to every one that this is a misconception, and far too restricted to admit of approval anywhere. A court would deserve the contempt of public opinion if it permitted so narrow a view of its prerogatives to prevail, and could not complain, if, during its recess, the court-room should be used for a cock-pit or a convenient place to erect a prize ring. That is the logic of the false assumption that was made in this case.

But wholly aside from this consideration there is a principle of protection to all who are engaged in and about the proceedings of a court that requires preservation against misbehavior of this kind. The defendant in court whose attorney was attacked is entitled to the protection of the court against any personal violence towards its attorney, while he is in attendance on the court. Otherwise, attorneys might be driven from the court, or deterred from coming to it, or be held in bodily fear while in attendance, and thereby the administration of justice be obstructed. This principle might be pressed beyond reasonable limits, to be sure, but it certainly is not going beyond the true confines of the doctrine to apply it here. It protects parties, jurors, witnesses, the officers of the court, and all engaged in and about the business of the court, even from the service of civil process while in attendance, and certainly should protect an attorney at the bar from the approach and attack of those who would do him a personal violence. A former ruling of this court on that subject has been especially approved by very high authority. *U. S. v. Anonymous*, 21 Fed. Rep. 761; *Sharon v. Hill*, 24 Fed. Rep. 726.

The only trouble I have in such cases is in fixing the proper punishment. I have always thought that I should invariably impose imprisonment on all who should fight in this court as the only adequate punishment for so grave an offense. Here, however, was a misconception of the general subject, and an honest belief that no wrong to the court could be implied from the transaction. The occurrence took place at recess, and while I do not deem this at all material as a mitigation of the offense, it furnishes the basis of respondent's assumption that the court could not be involved in the matter. It is only this misapprehension that causes me to mitigate the punishment. Hereafter there can be no misunderstanding on this point; and while this case will be a precedent for the principle we would enforce, it will not be considered such as to the character

of the punishment inflicted. The respondent will be adjudged in contempt of the court, and fined \$100, and pay the cost of this proceeding, and stand committed until the fine and costs are paid.

See note to *In re Carey*, 10 Fed. Rep. 629-633.

---

*Ex parte* Ah Lit.

(District Court, D. Oregon. February 4, 1886.)

POWER OF THE COUNCIL OF PORTLAND TO PUNISH FOR OPIUM SMOKING.

Subdivision 6 of section 37 of the charter of Portland authorizes the council "to prevent and suppress opium smoking, and houses or places kept therefor, and to punish any keeper of such house or place, or person who smokes therein, or frequents the same. *Held*, that no person can be punished for opium smoking under this authority, unless it is done in a house or place kept for that purpose.

On *Habeas Corpus*.

Zera Snow, for petitioner.

Albert H. Tanner, for defendant.

DEADY, J. On December 18, 1885, a writ of *habeas corpus* was allowed by me on the petition of Ah Lit, directed to Samuel B. Parrish, chief of police, and returnable in this court, commanding him then and there to produce the body of Ah Lit, together with the cause of his capture and detention. From the return of the writ, it appears that on December 15th the petitioner was tried and convicted, in the police court of Portland, of violating section 27 of the ordinance 3,983, entitled "An ordinance concerning offenses and disorderly conduct," approved October 13, 1883, which reads as follows:

"That any person who shall smoke opium in any house or place, or shall be in any house or place where opium is being smoked, without any lawful business, shall be deemed guilty of a misdemeanor, and, on conviction thereof before the police judge, shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars, or imprisonment in the county jail not exceeding twenty days."

By the complaint on which the petitioner was convicted he was accused of violating said ordinance, "by willfully and unlawfully conducting himself in a disorderly manner, by smoking opium in a certain house or place" therein described, within the limits of Portland; and on conviction thereof was "adjudged to pay a fine of \$15 and costs, and be imprisoned \* \* \* until such fine be paid, not exceeding seven days."

By the charter, as in force when this ordinance was passed, (section 37, subd. 5; Sess. Laws 1882, p. 151,) the council had authority "to suppress bawdy-houses, gaming and gambling houses, places kept for smoking opium, and opium smoking, and to punish the in-



mates of bawdy-houses, houses of ill-fame, keepers of places for smoking opium, and opium smokers." In *Re Lee Tong*, 9 Sawy. 333, S. C. 18 Fed. Rep. 253, this court held that the authority thus given to suppress gaming did not include the power to suppress any game not prohibited by the general law of the state, nor to punish any one for gaming otherwise than as prescribed by such law. Since then section 37 of the charter has been revised and amended (Sess. Laws 1885, p. 408) so as to give the council authority (subdivision 6) to punish the keepers of gaming and bawdy-houses, and persons who frequent the same; and "to prevent and suppress opium smoking, and houses or places kept therefor, and to punish any keeper of such house or place, or person who smokes therein or frequents the same."

Counsel for the petitioner contends that the imprisonment complained of is unlawful and void on several grounds; as that (1) the defendant holds the prisoner without a commitment of any kind; (2) imprisonment cannot be substituted for fine; (3) the prisoner is sentenced to seven days' imprisonment unless the whole amount of the fine is paid; (4) the prisoner is not charged with or convicted of smoking opium, but with disorderly conduct and disturbing the peace; and (5) neither the complaint nor judgment show that the prisoner was charged with or convicted of any offense known to the law.

It is not necessary to consider any of these points but the last one. The power to suppress opium smoking may, if given unqualifiedly, include the power to punish a person for a single act of smoking in his own house. But the power is not unqualifiedly given. The charter does not leave the power to punish persons for opium smoking, as a means of preventing and suppressing the same, to be implied without limitation. It expressly authorizes punishment to be inflicted therefor in certain cases, and therefore impliedly forbids it in all others.

Subdivision 6 of section 37 does not authorize the counsel to punish any one for smoking opium in his own house, or elsewhere than in a house or place kept for that purpose,—what is known, I suppose, in police jargon, as an "opium joint." The power to punish persons, as a means of preventing and suppressing opium smoking, is limited to the punishment of those who keep houses or places for that purpose, and those *who smoke therein*, or frequent the same. This act, though intended in the main to control and restrain the conduct of the Chinese in this particular, must be construed in the same way as if its purpose was to prevent and suppress some practice or habit more generally prevalent; as tobacco smoking and whisky drinking, or the keeping of "joints" or places for such purpose. No one will deny that the abuse, if not the common use, of these two articles in this community is of much greater injury to the health, peace, and morals of society than the present use of opium. But smoking opium is not our vice, and therefore we are more likely

to go to extremes in our desire to suppress it, or to vex those who practice it. Indeed, it is well understood that this legislation, however right in the abstract, is not so much the result of a desire on our part to reform the "Heathen Chinese" as to annoy him. In short, it is the old story of the Puritan and the bear. His opposition to the practice of "baiting" the beast was not because of the pain it gave Bruin, but the pleasure it gave the parties engaged in it. If the language used in subdivision 6, concerning opium smoking, was used in regard to whisky drinking or tobacco smoking, no one would pretend that it authorized the punishment of a person who drank or smoked occasionally or habitually in the privacy of his own or even in his friend's house, and not in a place or "joint" kept for that purpose; and there is no good reason in law or morals why the act should receive any looser or different construction because it applies only to the Chinese dissipation of opium smoking.

In *Re Lee Tong*, *supra*, this court, in speaking of the rule for ascertaining the powers of a municipal corporation, said:

"Apart from the few faculties considered necessary to its existence,—such as the capacity to sue and be sued, and to have a common seal,—a municipal corporation has no power to do any act except such as are essential to the plain purpose of its creation, or are authorized by the express provisions of its charter, or a clear or necessary implication therefrom."

So far from there being any express provision or necessary implication in subdivision 6 of section 37, authorizing the punishment of any one for smoking opium elsewhere than at a house or place kept for that purpose, the contrary is the case. The express provision giving power to punish the person who smokes in a "joint" excludes any implication of power to punish otherwise from the power to prevent and suppress smoking.

But it is asked in this connection, how is the council to prevent or suppress a practice unless it may directly punish those who engage in it? Admitting that such punishment may be an effective means to that end, it does not follow that the council have or ought to have the power to impose it under any or all circumstances. Evidently the legislature, in passing this act did not think it prudent or desirable that any person in this community should be liable to have the sanctity of his home invaded, and be punished by fine and imprisonment, by privately inhaling the fumes of opium, either as an experiment or a habit. But prevention and suppression may be more or less effected in various ways. Houses or places reasonably suspected of being used for gaming, fornication, or opium smoking may be put under surveillance, and the names of persons frequenting them may be taken down and published. Police officers may be employed for this purpose; and the houses may be opened and searched for evidence to convict the keepers, inmates, and frequenters. But, be this as it may, I am satisfied that the council have no power, under the

statute in question, to punish any one for smoking opium otherwise than in a house or place kept for that purpose.

In this case the prisoner appears at most to have been simply charged with and convicted of smoking opium in a private house. And this, as we have seen, is, under the act, not a crime. He might as well have been charged with smoking tobacco or drinking whisky therein.

But I do not wish to be understood as deciding that the council has not the authority to punish opium or tobacco smoking or whisky drinking on the street, or other public place, as a disorderly or offensive act or conduct. Nothing more is decided than this: Under subdivision 6 of section 37 of the charter, the act or habit of smoking opium cannot be punished, unless it is done in a house or place kept for that purpose. That fact is an essential element of the offense, and must be alleged and proved.

The caption and detention of the prisoner being clearly unlawful, he is deprived of his liberty without due process of law, contrary to the constitution of the United States, and is therefore entitled to be delivered from such restraint by a *habeas corpus* in this court, under section 753 of the Revised Statutes. Let him be discharged.

---

UNITED STATES v. CLINE.

(District Court, W. D. North Carolina. October, 1885.)

REVENUE LAWS—LICENSE TO RETAIL LIQUORS—SALE TO PERSON AT ANOTHER PLACE.

Where a person who has secured a license to retail liquors at one town receives an order for a certain amount of designated liquors from a person residing at another town or place, and he fills such order by taking or sending the liquor desired to such party, and collects the price therefor at the time of delivery, he is guilty of a violation of the revenue laws prohibiting the sale of liquor without license.<sup>1</sup>

Indictment for Retailing Liquors without a License.

H. C. Jones, U. S. Dist. Atty., for the United States.

R. F. Armfield, for defendant.

DICK, J., (charging jury.) There is no conflict in the evidence, and the credibility of the witnesses has not in any way been assailed, and your verdict should be governed by the instructions of the court upon the questions of law involved. The defendant paid a special tax, and obtained a license which authorized him to retail liquors at his specified place of business in the county of Catawba.

The first witness said that he resides in the town of Denver, in Lincoln county, many miles distant from the place where the defend-

<sup>1</sup>See note at end of case.

ant carried on his business as a retail dealer; that he sent a message to the defendant to send or bring him a gallon of liquor, and that some time afterwards the defendant in person delivered the quantity of liquor ordered, and received payment at Denver. The second witness said that he met the defendant at Denver, and made a contract with him for two gallons of liquor, which were afterwards paid for on delivery by defendant at Denver.

It is insisted by the defendant's counsel that these transactions do not constitute a violation of the statute regarding retail dealers in liquors, as the contract of sale was completed at the defendant's place of business by the measuring and setting apart of the specific quantity of liquors ordered by the purchasers. The doctrines of the common law as to contracts of sale of personal property have been elaborately discussed by counsel, and I will briefly state some of the familiar principles of law on the subject as enunciated by Blackstone, Kent, and other well-known text writers. It is not necessary for me, in this trial, to refer to any of the nice distinctions which have been drawn by judicial minds in applying the law to the peculiar facts and circumstances of decided cases.

Contracts of sale of personal property, at the common law, should be so construed as to ascertain the intention of the parties in regard to the passing of the title of the subject-matter of the agreement. "If a man agrees with another for goods at a certain price, he may not carry them away before he has paid for them, for it is no sale without payment, unless the contrary is expressly agreed." Where a sale is proposed by a vendor, and the offer is accepted by the vendee, "the bargain is struck;" but if, by the express terms of the contract, anything remains to be done by the vendor before delivery, or the delivery is to be made at a future day, and at a different place, on the payment of the price agreed upon, a complete present right of property is not vested in the vendee. The contract is, however, obligatory, and if either party fails or refuses to comply with his agreement, he is responsible in damages, if the other party is ready and willing to perform his part of the contract. When the terms of the bargain have been agreed on, and everything that the vendor has to do with the goods to put them in a condition for immediate delivery, the sale is absolute, without actual payment or delivery, so that the property is in the vendee, and the goods are at his risk as to accident and damage. The vendee is not entitled to the *possession* until he pays or tenders the price, or gets a future day for payment, for the vendor has a *lien* on the property for the price, and only payment or tender of payment gives the vendee a *right of possession*. If the vendee tenders the price to the vendor, and he refuses it, the vendee may seize the goods or have an action for obtaining them.

When specific goods are sold on a credit, and there is no agreement as to the time of delivery, the vendee is entitled to immediate possession, and the right of property at once vests in him. If goods

bargained for constitute only a part of a stock or larger quantity of the same kind, a title to the goods sold does not pass to the purchaser until they are set apart and designated as his portion. If the purchaser has paid for a certain quantity of goods in bulk, and has agreed to be present, and have the goods set apart and ascertained and delivered on or before a certain day, and he fails to comply with this agreement, the goods contracted for remain at his risk of damage and accident. It is not necessary for a vendor and vendee to come together in order to complete a sale of personal property and a transfer of the title. This can be done by the intervention of agents, or by means of written correspondence. If an agent negotiates a purchase in the name of his principal, the transaction has all the elements of a contract made by the principal. If a proposition of purchase is made by letter, and is accepted by a vendor, and he delivers the article purchased to a common carrier as directed by the purchaser, such delivery completes the contract of sale, and transfers title, without payment of the price, as the common carrier is the agent of the purchaser, and the vendor only has the right of stoppage *in transitu* if the purchaser is ascertained to be insolvent. If a vendor delivers an article ordered to a common carrier, marked "C. O. D.," and directed to an intended purchaser, the contract of sale is completed at the place of delivery to the purchaser on the payment of the price, as the common carrier is the agent of the vendor for the purposes expressed, and the ownership of the property set apart for the purchaser does not pass to him until he pays the price. This principle of law was applied by me in this court several years ago in the trial of the case of *U. S. v. Williams*, and I am informed that the commissioner of internal revenue has so ruled in the collection of special taxes from dealers in liquors.

After this brief statement of a few well-settled principles of law, I will proceed to apply some of them to the facts which you have to consider in making up your verdict in this case. The provisions of the internal revenue laws relating to dealers in liquors seem to contemplate that the contract of sale shall be consummated in the place specified in the license granted, on the payment of the special tax; and that the liquor sold shall be delivered to the purchaser or his agent, on the payment of the price, or on an expressly agreed credit. All the rights of ownership must at once pass from the seller to the purchaser. A retailer's acquired privilege is limited to carrying on his business at a certain place, where all of his transactions are subject to frequent official inspection, and he can have but few opportunities of evading the law.

If the messenger of the first witness had been an agent for the purchase of the liquor from the defendant, and had paid the money, and had the liquor measured, and set apart in a vessel for the purchaser, the contract of sale would have been completed at the defendant's place of business, and he would have been in possession of the

property as a bailee, and his subsequent delivery to the purchaser in Denver would not have been a violation of law. The messenger had no such authority, but only communicated the order of the intended purchaser as to a transaction to be completed at a future time and a different place. The property in the liquor remained in the defendant, and the contract of sale was not completed until the liquor was delivered and paid for at Denver. The testimony of the second witness shows that his contract of purchase was commenced and completed at Denver. If you believe the uncontradicted testimony of the witnesses, you should return a verdict of guilty against the defendant.

## NOTE.

A party who has paid a special tax, as a retail liquor dealer, at a particular town, who fills orders received by mail to ship liquors in retail quantities to another town, there to be delivered to the party so ordering upon payment of the price of the liquor, together with the express charges, is liable to the payment of a special tax as a retail liquor dealer at the place where such delivery is made. *U. S. v. Shriver*, 23 Fed. Rep. 134.

It was recently held by the supreme court of Vermont, in the case of *State v. Four Jugs of Intoxicating Liquors*, 2 Atl. Rep. 586, that where a liquor merchant in New York received an order for certain quantities of specified liquors from a retail dealer residing in Vermont, and he delivered the liquors ordered to an express company in New York, to be transferred to the retail dealer in Vermont, with instructions to collect the price and charges on delivery, that the merchant thereby made the express company his agent for the purpose of completing the sale and delivering the goods, and that the sale was made where the title to the goods was delivered,—in Vermont.

The supreme court of Wisconsin held in the case of *Sarbecker v. State*, 26 N. W. Rep. 541, that when the contract is silent on the subject, and there is nothing in the transaction indicating a different intention, and a manufacturer residing in one city receives, through his agent residing in another, an order for beer from a customer there, and fills the order by delivering the beer to a common carrier at the place of manufacture, consigned to such customer at his place of residence, or to such agent for him, the sale is complete, and the title passes at the place of shipment, even though the customer, on receiving the beer at his place of residence, pays to such agent there the purchase price; and the absence of a license to sell liquors in the county where the purchaser resided will not render the agent liable for selling without obtaining a license there. The court cite *Fragano v. Long*, 4 Barn. & C. 219; *Ranney v. Higby*, 4 Wis. 154; *Somers v. McLaughlin*, (Wis.) 15 N. W. Rep. 442; *Com. v. Farnum*, 114 Mass. 267; *Janney v. Sleeper*, (Minn.) 16 N. W. Rep. 365; *City of Kansas v. Collins*, (Kan.) 8 Pac. Rep. 865. The court say: "The same principle has frequently been applied, in the sale of liquors, to a purchaser residing in a place where all such sales, or all such sales without license, were prohibited," citing *Garbracht v. Com.*, 96 Pa. St. 449; *Finch v. Mansfield*, 97 Mass. 89; *Abberger v. Marrin*, 102 Mass. 70; *Brockway v. Maloney*, 102 Mass. 308; *Dolan v. Green*, 110 Mass. 322; *Frank v. Hoey*, 128 Mass. 263; *Hill v. Spear*, 50 N. H. 253; *Tegler v. Shipman*, 33 Iowa, 194; *Boothby v. Plaisted*, 51 N. H. 436; *Shuenfeldt v. Junkerman*, 20 Fed. Rep. 357.

In *Boothby v. Plaisted*, 51 N. H. 436, the defendant ordered, by sample, spirituous liquors of the traveling agent of a firm in another state where the sale was lawful, and they were put up, marked to purchaser, and shipped from the firm's place of business. It was held that the sale was made and the contract complete at the place of shipment, and that an action for the price could be maintained in New Hampshire, where such sale was unlawful. To same effect are *Hill v. Spear*, 50 N. H. 253, and *Tegler v. Shipman*, 33 Iowa, 194.

But in *Webber v. Howe*, 36 Mich. 150, where a liquor dealer from Ohio in person solicited and received in Michigan an order for liquors, which were afterwards shipped in Ohio, and delivered to the vendee in Michigan, it was held to be a sale in Michigan. Judge COOLEY says: "Had the order been sent from this state to dealers in Ohio, and filled there, or had an agent of the Ohio parties, who had no authority to agree upon sales, taken the order in this state, and transmitted it to his principals, who accepted and filled it," the sale would have been completed in Ohio; citing *McIntyre v. Parks*, 3 Metc. 207; *Orcutt v. Nelson*, 1 Gray, 536; *Garland v. Lane*, 46 N. H. 245; *Kling v. Fries*, 33 Mich. 275. See, to same effect, *Hausman v. Nye*, 62 Ind. 485; *Keiwert v. Meyer*, 62 Ind. 587.

## HARPER and others v. SHOPPELL.

(Circuit Court, S. D. New York. February 6, 1886.)

## COPYRIGHT—INFRINGEMENT—MAKING AND SELLING CUT FROM ILLUSTRATED NEWSPAPER.

One who makes a plate from which a copy of a picture in an illustrated paper, that is copyrighted, can be produced, and sells the plate to another, is not guilty of infringement of the copyright.

At Law.

*F. S. Bangs*, for plaintiffs.

WALLACE, J. The plaintiffs sue at law for an infringement of copyright, and the case has been tried by the court, a jury having been waived. The defendant has not intentionally infringed the plaintiffs' rights, and therefore nominal damages only are claimed. The conceded facts are as follows: The plaintiffs are the proprietors of *Harper's Weekly*, a copyrighted illustrated newspaper, published weekly, and in March, 1873, they published in that newspaper an impression of a cut entitled "Getting Married; Keeping House," which formed a prominent and considerable part of the newspaper. The cut was made and designed by one Reinhart, a citizen and resident of the United States, who sold it to the plaintiffs. They have never parted with the original cut, or given permission to the defendant or any other person to reproduce it. The defendant purchased a copy of the cut from a third person, in ignorance of the plaintiffs' rights, from which an electrotype plate was made, and sold by him to the proprietor of the *New York Illustrated Times*, who published an impression in the issue of that newspaper in September, 1882. It is assumed that Reinhart had not allowed this copy to be made before he sold the cut to the plaintiffs.

The only question in the case is whether the unauthorized reproduction and sale of a copy of the cut by the defendant was an infringement upon the plaintiffs' copyright. The copyright of the plaintiffs' newspaper was a copyright of a book, within the meaning of the copyright laws. A copyrighted song, printed upon a single sheet, was held to be protected as "a book," under the English statute of 8 Anne, in *Clementi v. Golding*, 2 Camp. 25. This decision was approved and followed in two cases arising under our copyright statutes, in which it was held that a book, within these statutes, is not necessarily a book in the ordinary and common acceptance of the word, but may consist of a single sheet, as well as of a number of sheets bound together. *Clayton v. Stone*, 2 Paine, 382; *Drury v. Ewing*, 1 Bond, 540. See, also, *Folsom v. Marsh*, 2 Story, 100.

The plaintiffs might have copyrighted the cut as an independent subject of copyright. They did not choose to do so. So, also, they could have copyrighted each poem or song or editorial composition of

their newspaper. If they had done this, a reproduction of the copyrighted thing would have been piracy, however innocent the defendant might have been of intentional wrong. They preferred to copyright their newspaper, and secure protection for it as an entire work. The cut was a legitimate part of the protected property,—as much so as the poems or editorial articles. The pictorial illustrations are one form of language employed by an author to express his ideas, and, when embodied in a book, are as much a component part of it as the printed text. But they did not thereby copyright the cut as a cut. The statute not only makes provisions for copyrighting charts, prints, cuts, engravings, etc., but makes a distinction between infringement of a book and of a cut, engraving, etc. A book is infringed by printing, publishing, importing, selling, or exposing for sale any copy of the book. Section 4964, Rev. St. A chart, print, cut, engraving, etc., is infringed by engraving, etching, working, *copying*, printing, publishing, importing, selling, or exposing for sale a copy of the chart, cut, etc. Section 4965. It would not be infringement of a book, within these sections, to prepare and arrange the type in exact imitation of the original, so that a copy of the book might be produced by printing; nor would it be to sell the means of making such a copy to another. The printing and publishing of a cut is an infringement of copyright as well as the printing and publishing a book; but the copying without printing or publishing is infringement only as to the cut, chart, print, engraving, etc.

The question here is not whether the defendant has infringed the plaintiffs' copyright in a cut; but whether he has infringed their copyright in their book by making a plate from which a copy of a portion of their book could be produced, and selling the plate to another. The copyright of a book is not always invaded by reproducing a part of the work. Where portions are extracted and published in a book or newspaper by another, the question whether there has been a piracy depends upon the extent and character of his use of them. Thus it is not piracy for a reviewer or commentator to make use of portions of a copyrighted work for the purposes of fair exposition or reasonable criticism. The question always is whether there is a substantial identity between the original book and the reproduction, or, as it is sometimes expressed, whether there has been an appropriation substantially of the labors of the original author. The law does not tolerate an appropriation which tends to supersede the original. A test frequently applied is whether the extracts, as used, are likely to injure the sale of the original work. See *Black v. Murray*, 9 Scotch Sess. Cas. (3d Ser.) 356. In the language of the court, in *Story's Ex'rs v. Holcombe*, 4 McLean, 308:

"The inquiry is, what effect must the extracts have upon the original work? If they render it less valuable by superseding its use in any degree, the right of the author is infringed, and it can be of no importance to know with what intent this was done."



Applying this test here, it is not altogether clear that the proprietors of the *Illustrated Times* infringed the plaintiffs' rights, although they published the cut in a competing newspaper.

In *Bradbury v. Hotten*, L. R. 8 Exch. 1, the piracy complained of was the publication of nine caricatures of Napoleon III., originally printed separately in numbers of *Punch*, issued within the period of 1849 to 1867. The court found that the defendant had republished them "for the same purpose as they were originally published, namely, to excite the amusement of his readers," and therefore that piracy was made out. It was doubted in that case whether the publication of a single picture would have been piracy. KELLY, C. B., said:

"It is said that the copying of a single picture, at all events, would not be an infringement of the plaintiffs' copyright; but it is impossible to lay that down as a general rule."

It is not necessary to determine the question here. Assuming that the publishing of a single poem or article or illustration from the copyrighted newspaper may be piracy, the defendant has not done this. The reproduction of the cut and the sale of the stereotype plate, without more, treating those acts as using an extract from the plaintiffs' newspaper, could not injure the plaintiffs, or interfere to any appreciable extent with the profits they could derive from the sale of their copyrighted publication. The cut was capable of use innocently in various ways, having no relation to the publication and sale of a newspaper. If the defendant had sold the electrotype plate, intending or even expecting the purchasers to use it in competition with the plaintiff, he might be regarded as having sanctioned that use in advance, and consequently as occupying the position of a party acting in concert with them and responsible with them as joint tort-feasors. *Wallace v. Holmes*, 9 Blatchf. 65. Thus it was held in *De Kuyper v. Witteman*, 23 Fed. Rep. 871, that a defendant who had printed and sold labels in imitation of a trade-mark, with the purpose of enabling the parties to whom he sold them to palm off their goods upon the public as those of the owner of the trade-mark, was an infringer. There is no evidence, however, in this case that the defendant contemplated that the purchasers would make any illegitimate use of the plate. They could have used it, as he could, to print a trade-mark or an advertising cut, or in other ways which could not interfere with the sale of the plaintiffs' newspaper. The law will not assume without evidence, or simply upon proof that the defendant sold the plate to the proprietors of a newspaper, that he intended to authorize a violation of the plaintiffs' rights. *Averill v. Williams*, 1 Denio, 501.

The defendant has copied the cut, but he has not printed or published it, nor has he exposed for sale any printed or published copy of any part of the plaintiffs' newspaper. Judgment is therefore ordered for the defendant.

RAILWAY REGISTER MANUF'G Co. v. BROADWAY & SEVENTH AVE.  
R. Co.<sup>1</sup>

SAME v. CENTRAL PARK, N. & E. R. R. Co.

(Circuit Court, S. D. New York. February 5, 1886.)

1. PATENTS FOR INVENTIONS—DEVICES SHOWN BUT NOT CLAIMED IN PRIOR PATENT TO SAME INVENTOR.

Ransom filed an application for a patent for fare-registers, July 12, 1879, which was subsequently divided into divisions A and B. A patent was issued on division A, April 20, 1880. The claims sued on in this case were added to division B, by amendment, September 27, 1881, never having been made before. The subjects-matter of these claims arose upon, belonged with, and were not separable from, the things which remained in division A. Defendants' devices, which were alleged to infringe these claims, were made under a patent to Reuben M. Rose, the application for which was filed nine or ten months after Ransom's patent on division A was issued, and more than seven months before the claims in controversy were inserted in division B. *Held*, that the question whether Ransom could have a valid patent for the claims sued on is not like that as to inventions of distinct parts of machines described, but not claimed, in applications for inventions of other parts, as in *Graham v. McCormick*, 11 Fed. Rep. 859, and *Vermont Farm Machine Co. v. Marble*, 19 Fed. Rep. 307.

2. SAME—REISSUE—ABANDONMENT OF INVENTION.

One reason why a patentee cannot have a valid reissue to cover parts of his invention described and not claimed, when the omission to make the claim is not caused by inadvertence, accident, or mistake, is because the parts of the invention not claimed are by this course abandoned to the public, and the right to claim them is gone.

3. SAME—SECTION 4920, REV. ST.

The defense of abandonment to the public is not confined to reissued patents, but is given generally by the statute to all patents.

4. SAME—INTERVENING RIGHTS OF THE PUBLIC.

Where a patentee shows and describes, but does not claim, in his patent certain features of his invention, he cannot have valid claims for these features in a subsequent patent, if the rights of the public have intervened.

5. SAME—BENTON PATENT, No. 260,526, JULY 4, 1882—FARE-REGISTER.

This patent sustained on reargument, (former decision 22 Fed. Rep. 656;) and the inventor being shown to have made the invention at least before September 23, 1877, he is not anticipated by the English patent to William Robert Lake, sealed November 14, 1877, as the date of sealing is understood to be the time when it became patented under the laws.

6. SAME—EXPERIMENTAL USE IN PUBLIC.

A public use, for the purpose of ascertaining the completeness of a device, for more than two years prior to the application, will not defeat a patent.

7. SAME—CONSTRUCTION OF CLAIMS—INFRINGEMENT.

A patented invention is to be construed in view of what existed at the time it was made: and all things are infringements that are brought out afterwards, and come within its scope.

In Equity.

Edward N. Dickerson, Jr., for orator.

John Dane, Jr., and John F. Dillon, for defendants.

WHEELER, J. These causes have been once before heard and decided. 22 Fed. Rep. 656. They have been opened for further proof,

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

and now heard again. They are brought upon patents for inventions Nos. 265,145, granted to Newman A. Ransom, assignor to the orator, for a fare register and recorder, for alleged infringement of claims 12 to 17; and 260,526, dated July 4, 1882, granted to John B. Benton, assignor to the orator, for a fare-register, for alleged infringement of all its claims.

Ransom made application for a patent on this fare register and recorder, with 31 claims, July 12, 1879. These claims were all rejected but one, on references to prior patents and publications. The specification was amended with 11 new claims, the fifth, sixth, and seventh of which covered means described in the specification for setting partial or trip registering wheels back to zero, a detent or holder for locking a zero-gathering and window-covering plate from forward rotation, and a combination, with a partial or trip register, of a turning plate for setting it to zero, and mechanism for indicating the number of times it was set at zero. The first four of these claims were rejected on a reference to a prior patent, the fifth, sixth, and seventh were found to interfere with a pending application of Benton, and further action was suspended to await the result of the interference. Thereupon Ransom filed a disclaimer of those things which have been mentioned as covered by the fifth, sixth, and seventh claims, specifying them particularly, and stating that he did not claim them in that application, as such subjects-matter were described and claimed in another pending application filed by him August 30, 1879, and designated as division B, which was filed, specifying and claiming those things on that day. The remainder of the original application was continued as division A, which resulted in patent No. 226,626, dated April 20, 1880, having five claims, the first of which was for a combination, in a fare-register, of a trip-register capable of being reset at zero; a total register moving forward concurrently with the trip-register; and mechanism, independent of the total register, for indicating the number of times the trip-register was reset, and the number of fares registered between the times of resetting; and the other four of which were the last four of the eleven remaining after the rejection of the first four, and the transfer of the subjects of the fifth, sixth, and seventh to division B. This patent had on its face a disclaimer of the things transferred to division B, specifying them as made the subjects-matter of that application. An interference was declared between division B and Benton's application, July 15, 1880, on which priority of invention was awarded to Benton, November 13, 1880. Reuben M. Rose made application for a patent for a fare register and recorder, February 12, 1881. Ransom amended the specification of division B, March 23, 1881. Patent No. 244,314 was granted to Rose, dated July 12, 1881. The claims of the Ransom patent now in controversy are for various combinations of a trip-register, independent resetter, graduated paper dial, yielding backing for the dial, marker, yielding marking arm, alarm,

actuators, and mechanism, whereby the dial will show the aggregate number of fares, and were made by amendment to division B, September 27, 1881, having never been made before. The patent was granted September 26, 1882. The defendant's machines, so far as they may infringe these claims, were made under the Rose patent. Question is now made as to the validity of these five claims, and it is different from any question considered in the cases before. The specific devices which were made parts of the subjects-matter transferred to division B do not enter into any of the combinations of these claims. Neither is the combination which was a part of those subjects-matter the same as or similar to either of these combinations. The trip-register was an element of that combination, and is an element of three of these. It is also an element in the combination of the first claim of patent No. 226,626 issued upon division A. All the elements of the combinations of these five claims enter into the structure of the machine which was the subject of the original application, and these combinations were parts of the invention covered by that application. They were not transferred to division B, and did not arise upon, nor belong with, the subjects-matter of that division. What was not transferred to division B remained in division A. These combinations arose upon and belonged with the things which so remained. They were not separable from the things which remained in the old application; the things which went to division B were separable from them, and did not take them into that division. When the patent No. 226,626 was granted upon division A, what was left of that division not covered by the claims of that patent was in the same situation as if division B had never been separated from division A. There was nothing transferred at that time from division A to division B. The former went to issue as an application by itself. The application of Rose was not made until between nine and ten months after that patent was granted, and about three months after the interference between division B and Benton's application had been decided in favor of Benton; and it was made over a month before the specifications of division B were amended after the decision on the interference, and more than seven months before the claims under consideration were made. Ransom had no claims pending at that time. The field of invention outside of the claims of Ransom's patent was apparently as open to Rose as to Ransom, except so far as Ransom's application might show that Rose was not the first inventor. Rose's patent and the infringement are entirely outside of division B as it stood at that time. If Rose's patent is for anything outside of the specifications of division A, he is, as to that, so far as these cases show, the original and first inventor of that, and his patent is valid to that extent, so far as appears, and a good justification for so much of the infringement of the orator's patent if there is such infringement of that. This patent is not valid against the patent of Rose unless Ransom could have a valid

patent for these combinations, as shown in division A, not covered by the claims of that patent, and have it upon the application in division B.

The question whether he could or not is not like that as to inventions of distinct parts of machines described in applications for inventions of other parts, and not claimed. *Battin v. Taggart*, 17 How. 74; *Graham v. McCormick*, 11 Fed. Rep. 859; *Vermont Farm Mach. Co. v. Marble*, 19 Fed. Rep. 307. It is a question as to an integral part of an invention described and made the subject of claims in other forms. The applicant said, in the amendment after Rose's application :

"This division is aimed to cover certain new combinations not claimed in my said patent of April 20, 1880, nor omitted therefrom by inadvertence, accident, or mistake."

The elements of the combinations were covered by claims in other forms, and those claims were parts of the same invention that would include the combinations. When these claims were made on division B, the patent-office suggested that the proper course would be to apply for a reissue of the patent granted on division A. The want of inadvertence, accident, or mistake was set up as an answer to that suggestion because it would leave no ground for a reissue. It is understood that one reason why a patentee cannot have a valid reissue to cover parts of his invention described, and not claimed, when the omission to make the claim is not caused by inadvertence, accident, or mistake, is because the parts of the invention not claimed are by this course abandoned to the public, and the right to claim them is gone. *Miller v. Brass Co.*, 104 U. S. 350; *James v. Campbell*, Id. 356; *Mahn v. Harwood*, 112 U. S. 354; S. C. 5 Sup. Ct. Rep. 174; *Coon v. Wilson*, 113 U. S. 268; S. C. 5 Sup. Ct. Rep. 537. These claims would appear to have been a proper subject for a reissue of the patent granted on division A, if Ransom was entitled to them when he made them on division B; and, if he was not entitled to them on account of the abandonment shown by his course on division A, they would not become valid claims by being attached to any other application. The defense of abandonment to the public is not confined to reissued patents, but is given generally by the statute to all patents. Rev. St. § 4920; *Railway Co. v. Sayles*, 97 U. S. 554. The rights of the public had intervened, and been followed by the application and patent of Rose, before there was any attempt on the part of Ransom to make these claims, and all the grounds on which claims made after taking a patent are held to be invalid appear against them.

The authority to grant a patent appears to depend on an application made and pending for that purpose. Rev. St. § 4886; *Eagleton Manuf'g Co. v. West, Bradley & Carey Manuf'g Co.*, 111 U. S. 390; S. C. 4 Sup. Ct. Rep. 593. It is not very plain where there was any application pending as a ground for these claims. What was not re-

served out of the original application to go into division B was left in division A, and was disposed of there, and not left pending anywhere. The subject of these claims was left in division A, and went to issue, and appears to have ended with that division. Upon such consideration as has now been given to these claims, they appear to be invalid.

The evidence introduced since the former hearing does not affect the Benton patent at all; but the whole case is open, and that part of it has been reargued, examined, and considered. The object of these fare-registers is to prevent frauds by those collecting fares. They contain a trip-register, which begins at zero, on which the conductor registers each fare as it is received from the passenger, and who is relied upon to see that the registration is made. This register has a dial with a hand that moves forward and indicates the number of fares which have been registered on that trip. At the beginning of each trip the register is to be reset, and the trip-hand made to point at zero. If this is not done, and the register and hand are left away from that point, opportunity for fraud in accounting for the fares registered on that part of the trip is left open. Benton invented, and his patent is for, a tell-tale hand which, when set with the trip-hand at zero, moves with it, indicating the true number of fares registered, and cannot be set back to zero unless the trip-hand is also set there, and which, when the trip-hand is set only a part of the way back to zero, remains at the place where it is stopped, and indicates where the trip-register was started, and shows the attempt to cheat. His application for the patent was made October 31, 1881. A hand on a dial to a thermometer, to be left to indicate the highest and lowest temperatures, was shown in patent No. 68,681, granted to Martin Ames for a self-registering thermometer, dated September 10, 1867; and one to be left on the dial of a steam-gauge, to show the highest pressure, was described in patent No. 124,816, granted to Thomas C. Hargrave, for an improvement in registering steam-gauges, dated March 19, 1872. Neither of these has the combinations of such a hand with a trip-register of fares required to be set to zero at each trip. Such a hand, for a similar purpose in a fare-register, was patented in England to William Robert Lake, November 14, 1877, and was the subject of patent No. 245,221 for an indicator for fare-registers, applied for by Reuben M. Rose, April 14, 1881, and dated August 2, 1881, under which this part of the fare-register of the defendants is made. Benton is shown by uncontradicted oral evidence to have made his invention as early as March 22, 1877, before even the provisional specification of Lake was filed; and by written and quite conclusive evidence to have made it before September 22, 1877, which is earlier than Lake's patent was sealed, which is understood to be the time when it became patented within the meaning of the patent laws. Benton is thus clearly shown to be the first inventor. The invention was in use in public, for the purpose of ascertaining its

completeness, more than two years prior to his application; but such public use for that purpose would not defeat the patent. *Elizabeth v. Pavement Co.*, 97 U. S. 126.

Much stress is laid by the defendants upon the question of infringement. The defendants' registers have a tell-tale hand in the combinations of the patent. Moving it forward moves the trip-hand forward with it, but moving the trip-hand forward in registering fares does not move the tell-tale hand forward. The trip-hand is set to zero by moving the tell-tale hand forward, only taking the trip-hand with it. If it is stopped short of zero, and the registering of fares begun, the tell-tale hand remains where it is stopped, to indicate the place where it is stopped, and the attempt at fraud in commencing the registrations of a trip at that place. The tell-tale hand of the patent is reset by being turned backward to or towards zero by the trip-hand; and if that is stopped short of zero, and the registering of fares begun, the tell-tale hand remains there to show the place where the trip register and hand were stopped, and the attempt at fraud in commencing the registrations of the trip from there. The trip-hand is left in each case to show the wrong place in commencing registration. The difference is only in the means by which it is brought there. When there, they are equivalents in the combinations with the other parts in accomplishing the desired result.

The defendants' expert was asked in cross-question 74 if he contended that the defendants' apparatus did not contain the combinations of the patent, and he answered: "Construing such claims broadly, as covering usual mechanical equivalents, I consider that the defendants' apparatus does contain such construction." The other parts of his testimony show that he considered the patent to be limited, by the prior patents of Lake and Rose, to the differences between it and them. But as priority of invention is awarded to him over them, his patent is to be construed as broadly as if their patents had never existed, nor their inventions made. His patented invention at the time when it was made is to be construed in view of what then existed. All things are infringements that are brought out by others afterwards, if they come within its scope. *O'Reilly v. Morse*, 15 How. 62; *Water Meter Co. v. Desper*, 101 U. S. 332; *Mason v. Graham*, 23 Wall. 261. This answer of the expert was understood to substantially admit infringement of this patent, if it was valid, when the case was under consideration before, and to obviate the necessity of such extended examination of this part of the case as has been given to it now.

These views lead to a decree for the orator as to the Benton patent, and for the defendants as to the Ransom patent. The costs are apparently about equal on each patent, and thus far no costs should be allowed to either party. Let there be a decree that claims 12 to 17 of the Ransom patent are invalid; that the Benton patent is valid, and is infringed by the defendant; and for an injunction and an account in each case, without costs to the time of this decree.

**HARTFORD MACHINE SCREW Co. v. REYNOLDS and others.<sup>1</sup>***(Circuit Court, D. Connecticut. February 9, 1886.)***1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM.**

The fourth claim of letters patent reissue No. 9,290, of July 13, 1880, to Christopher M. Spencer, for machine for making metal screws, is in its most important particulars, a reproduction of the first claim of the original patent, No. 143,306, of September 30, 1873, and is valid.

**2. SAME—EQUIVALENTS—INFRINGEMENT.**

The claim of the patent sued on was for a combination of mechanical devices for feeding forward a rod as screws were cut from it, and covered a combination of a hollow mandrel, a conical-ended sleeve, and a friction-feed device, or tube, arranged concentrically, one within the other, and in the order named. Defendants used the same parts, but placed the conical-ended sleeve outside the mandrel. *Held*, that this was an immaterial difference, and such arrangement was an infringement.

*Charles E. Mitchell*, for plaintiff.

*John K. Beach* and *Benj. F. Thurston*, for defendants.

**SHIPMAN, J.** This is a bill in equity to restrain the infringement of reissued letters patent No. 9,290, issued July 13, 1880, to Christopher M. Spencer, assignor to the complainant, for an improved machine for making metal screws. The original patent, No. 143,306, was dated September 30, 1873. The machine, as a whole, is a very important and useful one. The brief statement which the inventor gives, in the reissued specification, of the character of the invention is as follows:

"The machine automatically makes screws upon the end of a rod. This, my improved, machine has been organized with special reference to operate upon the end of a rod, form a screw, remove the threading tool from the screw-thread cut on the rod, cut off the said screw, and then to automatically feed the rod forward, and make another screw, and so on until the rod is exhausted. By my plan the intermittent feeding of the rod is effected by a frictional feeding device made as a slotted, rotating, and reciprocating tube, and the rod is rotated by a rotating chuck having jaws, the chuck having no function whatever in the forward movement of the rod, and, in connection with such mechanism, to feed forward and rotate the rod at the proper time. I have combined and arranged a rotating tool-carrying turret, the tools of which are brought intermittently into proper position to turn down and thread the end of the rod; and the screw having been threaded, and the threading tool removed from it, a cutting-off tool is moved forward, and made to cut the screw from the end of the rod. By feeding the rod forward, by means of a friction feed, such as herein employed, rather than by a chuck, I am enabled to simplify the construction of the chuck, as it has but one motion, viz., that of rotation; and by employing a rotary tool-carrying turret, and cutting-off tool, as hereinafter set forth, I am enabled to form and thread the screws and cut them off all in the simplest and most expeditious manner; my mechanism, by reason of its simplicity and mode of operation, increasing the speed of manufacturing screws, and decreasing their cost beyond what would be the case if the turning-down and threading tools were operated by independent carriers; and so, also, by withdrawing the threading tool from

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.



the screw before it is cut from the rod, the use of a screw-driver to remove the screw from the threading tool is obviated."

It will be seen that the mechanism is threefold: *First*, for feeding forward and rotating the rod; *second*, for forming and threading the screw upon the end of the rod; and, *third*, for cutting off the completed screw. The alleged infringement relates to the first-named portion of the machine, and to the fourth claim of the reissue. This part of the mechanism is described by Mr. Shepard, one of the plaintiff's experts, as follows:

"These parts consist of a revolving chuck provided with suitable holding jaws. This chuck is mounted upon the end of a revolving shaft, which has no longitudinal movement; the shaft being made hollow to receive the friction-feed device and the rod from which the screws are to be formed. The friction-feed device consists of a tube of a size which will allow the rod to pass through it, said tube being split at its forward end, and the two opposite sides impinge upon the rod with sufficient friction to carry the rod forward when the tube is moved in the direction of the chuck; while, on the other hand, if the rod is pinched between the jaws of the chuck, the feed device or split tube will slip upon the rod as it is drawn back. One end of the feed device is provided with an annular groove to receive a projection on a slide or slipper, which slide is reciprocated by a cam, thereby imparting the necessary reciprocating movement to the feed device. The jaws are forced together and permitted to open by means of a conical-ended sleeve, which is outside of the friction-feeding device or feeding tool. This sleeve is also provided with a shipping groove, connected, by means of a suitable slide, to another cam, whereby a reciprocating movement is imparted to the conical-ended sleeve. These cams, feed device, and conical-ended sleeve are so combined with each other and with the chuck that the feeding device is fed forward at a time when the conical-ended sleeve is withdrawn, so as to permit the jaws to open, and, after the feeding device has reached the extent of its forward movement, said conical-ended sleeve operates to close the jaws, and hold the rod from slipping backward while the feeding device is drawn back to get a fresh hold on the rod. This friction-feed device reaches well up towards the jaws, so that it will feed the rod until only a very short piece is left."

The friction-feed device or tube runs inside the conical-ended sleeve, which runs inside the revolving shaft or mandrel. Thus there are three concentric sleeves, the mandrel being outside.

In the application for the present reissue the patentee claimed, as a distinct invention, "the friction-feed device made as a tube, slotted at its end, and sprung together to grasp the rod;" but acquiesced in the refusal of the patent-office to allow that claim, and erased it from the application. It must be assumed, therefore, that the invention consists in the combination of the devices mentioned in the respective claims. The gist of that part of the invention which relates to the feeding mechanism was the automatic feeding device, acting in connection with the jaws, to feed the rod forward when the jaws are open,—the chuck and rotating shaft having no longitudinal movement,—and, when the jaws are shut, and the stock is being held and operated upon, to slip back and take a new hold, preparatory for a new feed, and the location of the feeding device

within the sleeve which closes the jaws, whereby the stock can be worked up with great economy of material. It is thus apparent that, although the friction tube must be considered to be old, it is a very important member of the combination which includes the feeding mechanism.

This part of the machine is claimed in the first claim of the original patent, as follows:

"In combination with revolving chuck, A, having jaws, o, o, the inner and outer sleeves, c, w; the former, by intermittent reciprocating motion produced by cam, H, feeding the stock a suitable length through chuck, A; the latter by a similar motion produced by cam, L, alternately opening jaws, o, o, to permit the passage of stock, and closing them to hold stock to be operated upon by suitable tools."

The same combination is claimed in the fourth claim of the re-issue, as follows:

"In combination, the revolving chuck, g, provided with jaws, g, the friction-feed device, d, to grasp the rod, and the sleeve, f<sup>4</sup>, the cam, c, or its equivalent, to reciprocate the sleeve f<sup>4</sup>, to close the jaws while the rod is being rotated, and the tube, d, drawn back, and to permit the jaws to be opened as the tube is moved forward to feed the rod forward, all substantially as described."

This claim is, in its most important particulars, a reproduction of the first claim of the original patent, and differs from the second and third claims of the reissue in that they specify that the conical-ended sleeve is located between the friction sleeve and the hollow shaft. The location of the sleeves, with reference to each other or to the mandrel, is not stated in the fourth claim; but, in order to avoid the vice of an improper expansion of the original patent, the claim must receive the same construction which properly belonged to the first claim of the original, and the two sleeves are the inner and the outer sleeve of that claim.

Looking more closely into the claim, the defendants insist that the two sleeves are not only an inner and outer sleeve, with reference to each other, but that it is indispensable that nothing should be interposed between them; while the plaintiff says that the claim had no reference to the location of the sleeves with reference to the mandrel.

The three sleeves of the Spencer device are so constructed that the conical sleeve is interposed between the mandrel and the friction tube; but I do not perceive that, in the specification or in the claims of the original patent, that form of construction was made an indispensable feature of the mechanism, as it was apparently made in the second claim of the reissue. The first claim of the original was, so far as the two sleeves are concerned, for an inner friction slotted tube and an outer conical sleeve, which are in fact concentrically arranged within the hollow shaft; but it was not designed that the form of the arrangement with reference to this shaft should be so essential that a known equivalent method of arrangement should be without the patent. The language of the claim did not require such a construc-

tion, and the invention did not consist in the exact order of arrangement, with reference to the hollow shaft, but had the broader scope which has been stated.

The feed devices of the defendants' mechanism are the counterparts of the plaintiff's machine, except that the conical sleeve slides upon the outside of the hollow shaft which carries the chuck, and acts upon the jaws of the chuck in the same way as the corresponding sleeve of the Spencer machine does; while the friction tube operates, in each machine, in the same way with reference to the other members of the combination. This is an immaterial difference.

The feeding device in the Matthews machine for making, from a rubber rod, rubber washers of about three thirty-seconds of an inch thick for bottle stoppers is claimed to be an anticipation of the fourth claim. There are some analogies between the two feeding mechanisms, which are skillfully used to make out a similarity between the machines; but the two devices are as radically different as the purposes for which they were respectively used differ. The Matthews machine did not have the friction slotted tube, and did not have the chuck, except by a strained use of words. It did not have the parts of the Spencer combination, nor the combination, and could not be adapted to the making of machine metal screws.

Let there be a decree for an injunction and an accounting, with reference to the use of the fourth claim.

---

### HUTCHINSON v. EVERETT and others.<sup>1</sup>

#### EVERETT and others v. HUTCHINSON. (Cross-Bill.)

(Circuit Court, N. D. Illinois. November 30, 1885.)

#### 1. PATENTS FOR INVENTIONS—ABANDONED EXPERIMENTS.

Where one made, in 1874, a device which was claimed to embody an invention patented to another in 1879, which earlier device never went into practical use, *held*, that the 1874 device was an abandoned experiment, and was not sufficient to defeat the patent.

#### 2. SAME—FAILURE TO ASSERT TITLE TO INVENTION.

It is hardly conceivable that one who was in fact the prior inventor of a device, on seeing it in use, and knowing that another claimed to be the inventor, would have uttered no protest, and laid no claim to the invention.

#### 3. SAME—FAILURE TO APPLY FOR A PATENT.

A. claimed to have invented a device in 1874. B. obtained a patent for the device in 1879. Subsequently A. applied for a patent for an improvement on the device patented to B. *Held*, that the inference was that, if A. had been in fact the inventor of the device patented to B., he would have shown and claimed it in his application, instead of applying for a patent on what was, at most, only an improvement on such device.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

4. SAME—PUBLIC USE.

The fact that a person, claiming to have invented a device in 1874 or 1875, knew that another had put it into public use in 1878, is sufficient to defeat his claims to take out a patent in 1883, even if he had been the inventor.

5. SAME—CONFLICTING PATENTS.

Patent No. 289,928, issued December 11, 1883, to Amos F. Parkhurst, assignor to Edward H. Everett, for a bottle stopper, canceled, because it interferes with patent No. 213,992, issued April 8, 1879, reissued June 17, 1879, as reissue No. 8,755, to Charles G. Hutchinson, for an improvement in bottle stoppers.

In Equity.

*West & Bond*, for complainants in original bill.

*Stem & Peck* and *J. P. Altgeld*, for defendants.

BLODGETT, J. The complainant in this case charges that he is the owner of patent No. 213,992, dated April 8, 1879, which was reissued June 17, 1879, as reissue No. 8,755, for an "improvement in bottle stoppers," and files this bill as the owner of this reissued patent, under the provisions of section 4918 of the Revised Statutes, to obtain the cancellation of patent No. 289,928, issued December 11, 1883, to Amos F. Parkhurst, assignor to Edward H. Everett, for a "bottle stopper," on the ground that the Parkhurst patent interferes with the patent owned by complainant; and the defendant Everett has filed a cross-bill charging that Parkhurst was the first inventor of the device covered by complainant's patent, and that the Hutchinson patent interferes with the patent issued to Everett, as assignee of Parkhurst, and praying that the Hutchinson patent be canceled.

There is no dispute as to the point that the two patents in question cover the same device by substantially the same claims, and no question is raised by the original or cross bill as to the title of either party to their respective patents. The only contention in case is, who was the inventor of the device which it is conceded is covered by the two patents? The device in question is that of an internal stopper suspended in the neck of the bottle, and arranged to be drawn upward for the purpose of closing, and to be pushed downward when it is desired to open the bottle; such stopper being provided with an elastic wire stem projecting upward from the top of the stopper, rigidly attached thereto, and so bent and arranged as to form a spring which shall press laterally against the interior sides of the bottle neck, so as to hold the stopper suspended in the neck either when the bottled is closed or open; this bent spring forming a bail or loop, with which a hook or other device may be made to engage, for the purpose of drawing the stopper to its seat when it is desired to close the bottle, or pushing it down to open the bottle; this spring bail or loop being practically a handle to the stopper plug which, by means of the spring pressing against the inner sides of the bottle neck, holds the stopper suspended in the neck, preventing it from falling down into the bottom of the bottle, or falling out through the neck, and serves as a handle with which to manipulate the stopper for the purpose of closing or opening the bottle. Both patents show the same

form of stopper and spring handle or stem, operating in the same way, for the same purpose.

The proof shows that Hutchinson first constructed his stopper, after substantially the form shown in his patent, in the month of September, 1878, and put it into use in the bottling works carried on in this city by the firm of W. H. Hutchinson's Sons; that he made a large number of these stoppers during the fall and winter of 1878, sold some, and put the rest in use in the Hutchinson's Sons works; that he applied for his patent in October, 1878, and the original patent was issued April 8, 1879, and that from early in October, 1878, the Hutchinson stopper was in extensive public use, not only in the Hutchinson works, but in other bottling establishments in Chicago, for nearly five years before the Parkhurst patent was applied for. It is claimed, on the part of defendants, that Parkhurst made his invention as early as 1874, and that by reason of his poverty he did not apply for his patent until August, 1883.

A careful study and analysis of the testimony satisfies me that the stopper made by Parkhurst in 1874 or 1875, and which he showed to the witnesses Joseph and Henry Shure and to Richard Otten, was what is called the "double figure eight stopper," known in the proofs as "Ex. Parkhurst No. 1." Parkhurst was at this time a manufacturer, in a small way, of neck wires for external bottle stoppers, at Algonquin, a village on Fox river, in this state, 10 or 12 miles above Elgin, and showed this "double figure 8 stopper" to the Shures, who were engaged in the bottling business in Elgin, and asked them to try them, and they did try them to the extent of putting from one to six into bottles, but did not adopt or keep them in use or approve of them, or consider them practical. This I conclude from the proof is all that Parkhurst did towards accomplishing this invention before the fall of 1878, and I think the chief question is, does this "double figure eight stopper" show the same invention as that covered by these two patents?

The patents both show a stopper made of two metal disks, with a rubber disk between them, having a wire stem extending upward from the center of the metal disks, bent to a shape similar to that of a figure 8; while this "double figure 8 stopper" shows two stems projecting upward from the outer periphery of the metal part of the stopper, each bent to a shape approximating to a figure 8. That a stopper with springs like this would be held suspended in the neck of the bottle in substantially the same manner as the one made after the drawings of the patent is probably true; but it is obvious that it would not be as readily manipulated as the one with a single stem or spring, because there are two loops, instead of one, and neither of them is over the center of the plug, so that when the force was applied, by a hook or otherwise, to draw the stopper to its place, and close the bottle, it will draw sideways, instead of from the center of the stopper. Again, it would obviously be much more expensive to

make such a stopper, and when the increased expense and the difficulty of manipulating are both considered, it may be doubtful if it could be called a complete operative device for the purpose intended.

It is urged that with this "double figure 8 stopper" produced, there was no invention in removing one stem, and in placing the remaining one in the middle on the plug; but the answer to that seems to me to be found in the fact that no one adopted it as Parkhurst had produced it, and Parkhurst himself did not get any one to put into use, and did not modify it into a U-shaped or "single figure 8" stopper until after he had seen Hutchinson's stopper in the fall of 1878. I conclude, therefore, that what Parkhurst did in 1874 and 1875 must be treated as an abandoned experiment, and not therefore an anticipation of the operative and practical device produced in September, 1878, by Hutchinson. The proof is very clear that Parkhurst was shown the Hutchinson stopper in the fall of 1878, about the time that Hutchinson applied for his patent, and made no claim to have invented it; and I think the fair conclusion from the proof is that Parkhurst stopped his experiments with the production of the "double figure 8 stopper," and did nothing further towards perfecting it until after he had seen Hutchinson's stopper. He did not produce a completed invention acceptable and operative in 1874 or 1875. If he had done so, what he did then might be deemed an abandoned invention, which, by such abandonment, became public property, instead of an abandoned experiment.

The proof shows that Parkhurst, in the forepart of October, 1878, saw the Hutchinson stopper, and was asked if he could not make a machine to manufacture it, and answered that he thought he could do so. He was familiar with the bottling business, and often in Chicago, and his business was mostly, if not wholly, with men engaged in the bottling trade. He knew that Hutchinson claimed to be the inventor of the device covered by the Hutchinson patent. It is hardly conceivable that he would have uttered no protest, and laid no claim to the device, if he, Parkhurst, had in fact invented the same thing three or four years before. There is no proof that his poverty was so extreme as to make it impossible for him to have obtained a patent, or at least applied for one. Inventors, as a rule, are egotistic, and, if too poor to obtain a patent rarely stand by and see another appropriate what they have invented, without a protest. Parkhurst's acquaintance was with Hutchinson's competitors in business, and it is hardly supposable that, if he had known himself to be the inventor of this device, he would not have made it known to some of these competitors, who would gladly have aided him with moneyed assistance. Parkhurst also testified that during 1877, and the early part of 1878, he showed his completed "figure 8 stopper" to several of the Hutchinson competitors in the city of Chicago, but they all testify that he did not make any such exhibit to

them, and that they never saw such a stopper as is covered by the Hutchinson patent until it was produced by Hutchinson.

It also appears that in the spring of 1879, or perhaps earlier, Mr. Mettee, of Chicago, became acquainted with Parkhurst, and agreed to aid him in obtaining patents for his inventions, and in May, 1879, application was made for a patent bottle stopper operating on the same principle as that of Hutchinson's, except that the stem or handle was hinged to the stopper so as to make a free joint at the point where the stem was attached to the stopper, instead of the rigid attachment shown by Hutchinson. The inference I draw from this is that if Parkhurst had in fact been the first inventor of the Hutchinson device, he would then have shown and claimed it, instead of applying for what at most was only an improvement on Hutchinson's device.

Parkhurst's memory as to dates and the sequence of events is so defective that the defendant's counsel admitted on the argument that he was a wholly unreliable witness as to dates, except when corroborated, and all the corroborative testimony which I think worthy of belief goes solely to the time when the "double figure 8 stopper" was produced, as I do not consider the testimony of the witness Failing sufficiently reliable to be accepted as proof of the fact that Parkhurst made a U stopper like defendants' Exhibit No. 3, or that this witness made this Exhibit No. 3 as early as 1877, when he was a boy about 16 years old. On the contrary, if the testimony of this witness, to the effect that Parkhurst made stoppers, for experiment, like defendants' Exhibit No. 3, in 1877, is true, it could hardly be possible that Parkhurst would not have asserted his right to the invention in 1878, when he knew that Hutchinson was claiming the invention, and had applied for a patent. It is much more probable, I think, that this witness is mistaken by a year, and that, if he made the defendants' Exhibit No. 3, he made it in the fall of 1878, when it is admitted Parkhurst did make a few stoppers in that form after he had seen Hutchinson's "single figure 8 stoppers."

My own conclusion from the proof is that after Parkhurst had made his "double figure 8 stopper," in 1874 or 1875, he did nothing more until he saw Hutchinson's stopper in the fall of 1878, and then he made a U stopper; but, finding that Hutchinson had described the U shape as one modification or form of his patent, he did nothing further in the matter until Everett opened negotiations with him for the purchase of his pretended invention.

I have already said that I am satisfied from the proof that Parkhurst knew of the public use of the stopper described in his patent from early in the fall of 1878, and this public use, with Parkhurst's knowledge, must defeat his claims to take out a patent in 1883, even if he had been the inventor of this device; and leaves only open the question whether anything which Parkhurst did before September, 1878, should defeat Hutchinson's patent, and upon this point I

am clear that Parkhurst did not do enough to amount to a complete invention. He took some steps in that direction, but did not go far enough to forestall or defeat Hutchinson. I therefore find that the patent of defendant interferes with complainant's patent, and that the complainant is entitled to a decree canceling defendants' patent, and that the cross-bill of defendants should be dismissed for want of equity.

---

WATSON v. BELFIELD and others.<sup>1</sup>

(Circuit Court, D. New Jersey. February 6, 1886.)

1. PATENTS FOR INVENTIONS—SUGGESTIONS TO AN INVENTOR.

The true test to determine whether suggestions made to an inventor should deprive him of the claim to originality in the invention, is to inquire whether enough has been communicated to enable him to apply it without the exercise of more invention.

2. SAME.

A general knowledge of the substance of the invention covered by letters patent No. 169,871, of November 9, 1875, to John Watson, for improvements in clay-presses, was communicated to the inventor before he attempted to embody it in a practical apparatus, and hence his patent is void for want of novelty in the invention.

In Equity.

*Edw. A. & Wm. T. Day*, for complainant.

*James Buchanan*, for defendants.

NIXON, J. This suit is brought to recover damages for the infringement of letters patent No. 169,871, granted to the complainant, November 9, 1875, for "improvement in clay-presses." Numerous defenses are set up in the answer, and the testimony has been spread out to an extent quite inexcusable, as it seems to me, in view of the shortness of human life, and the pressure for time to consider other matters of at least equal importance.

One of these defenses is that the complainant is not the original and first inventor of the invention patented; and, if this should be found for the defendant, no time need be taken to look into the other defenses. The complainant is a machinist, residing in Trenton, New Jersey. His alleged invention relates to improvements in apparatus for preparing clay for the manufacture of earthenware. He claims that he made the invention in the month of February, 1874, while he was on a visit to East Liverpool, Ohio, taking measurements and making drawings for the machinery to be furnished by him for a new building then in the course of erection for Laughlin Bros. His story, briefly, is that while there, an improvement in clay-presses became the subject of frequent conversation between him and one Pier-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.



son, and Homer Laughlin, Shakspear Laughlin, and others; these gentlemen alleging that some new invention of clay-press taps or cocks by one Boulton had lately been introduced into England, the character and nature of which they knew nothing, but which was claimed to be a valuable improvement upon the old method of preparing the clay for the manufacture of pottery ware, and asking him whether he was not able himself to improve upon the tedious and troublesome method then in use in this country, by getting up something new. He said he would try. He thought over the matter, and, taking out his memorandum book in the room at East Liverpool, where he was at work, he made a sketch or drawing of a new tap, which he believed would be an improvement upon the old tap, and showed it to them. They made no suggestion to him about it, and did not appear to understand how it would work, and told him so. He returned to Trenton, and determined to construct a rough model of his drawing, and to make a set of the new taps, and try them on a press that he was then building for West, Hardwick & Co., of East Liverpool. He sent them their press with these new taps about April 7, 1874, and was so well satisfied with their practical working that he placed them also on the new machinery that he was putting into the factory of Laughlin Bros. Their great value was demonstrated by their use, and he applied for and obtained the letters patent, for the infringement of which this bill is filed.

A number of witnesses for the defendants swear to a very different state of facts, and which, if true, negatives the claim of the complainant that he was the original and first inventor of the thing patented.

Edward M. Pierson testifies that he came to this country from England in 1873; that he was a potter by trade, and the son of a potter, residing in Staffordshire, England; that in the month of July of that year he went to East Liverpool, Ohio, for the purpose of going into the pottery business; that arrangements were entered into with Laughlin Bros. for the erection of a new factory there; that he drew the necessary plans, and sent them to his father for examination, and requested him to go to William Boulton, a machinist in Burslem, and get his estimate for the machinery for a four-kiln pottery; that his father sent him an estimate by Boulton, in which general reference was made to his new patent conduit tap; that he wrote again to his father requesting him to send the particulars of the new tap referred to by Boulton; that he received a reply, giving the description, and stating that it was a new tap, patented by Boulton,—very ingenious,—doing away with a number of motions; that it was screwed to the chamber, and socketed in each other; that in the mean time they took other bids for the machinery in their new building, and, after a comparison of the same, gave the contract to the complainant, and invited him to East Liverpool to draw the plans; that he came about February, 1874, and they had several conversations with him about this new Boulton tap, which was then unknown in the

United States; showed him the Boulton estimate, and the letter from the father of the witness explaining it, and asking him whether he would not be able to reproduce it from their descriptions; that, after making a drawing, and examining drawings which the witness produced, he was quite sure that he understood it, and was able to make it; that the result of these conversations and experiments was that they agreed upon the form of the Boulton tap, and complainant was requested to make and put them in the presses, first of West, Hardwick & Co., and afterwards of Laughlin Bros.; and that after a fair trial, regarding them as an improvement upon the old taps, the complainant proposed to the witness that they should apply for a joint patent on the new taps, which proposition he indignantly rejected.

Homer Laughlin confirms the general correctness of this testimony, with more detail as to some particulars. He recollects the correspondence between Pierson and his father, and between Boulton and his firm, in regard to the new Boulton taps, and also the conference between Watson, Pierson, and himself as to the mode of their construction and application. He states that he told the complainant distinctly, when he was preparing his bids for the machinery in the factory building of Laughlin Bros., that they must have the new tap, for the reason that it was supposed to economize so much in labor in operating the clay-presses; that Watson carefully considered the Pierson sketch of the Boulton tap, and the description of it in Boulton's letter, and said that it could be reproduced in this country; that he could make it, and would guaranty it to work; and that it was upon this guaranty that he accepted his bids in the machinery. He further testifies that he heard no suggestion or pretense on the part of the complainant that he was inventing anything, or doing anything more than producing from the descriptions and drawings the English tap of Boulton. There is evidence of the same or of a corroboratory character from other witnesses, such as Edward Gibbs and Perry Johnson, which I will not stop to quote.

All these witnesses seem to be intelligent, disinterested, and unimpeached, except so far as the denial of the truth of their principal statements, made by the complainant, without reserve or qualification, may be regarded as an impeachment. It is impossible to conceive that both parties are speaking the truth, and I am compelled to say that the weight of the evidence is largely against the complainant.

The cardinal features of the patent, on which the said suit is brought, is found in the first claim, to-wit: "The combination, with a clay-press, of a main pipe made in detachable sections." There are some details; but nothing involving invention, and which would not readily suggest themselves to any intelligent mechanic who was trying to attach such a pipe to the leaves of the press. This was also the distinguishing feature of the Boulton tap, a general knowledge of which seems to have been communicated to the complainant before

he attempted to embody it in a practical apparatus for preparing the slip for manufacturing purposes.

It is always a difficult question to determine how far the suggestions made to an inventor deprive him of the claim to originality in the invention thereof. The rule in such cases is concisely stated by Judge STORY in *Alden v. Dewey*, 1 Story, 338. One of the defenses in that case was that one Draper had substantially imparted to the patentee the patented improvement. In charging the jury the learned judge asked whether enough had been communicated to enable the inventor to apply it without the exercise of more inventive power. This he regarded as the true test. "It was not enough," he said, "that Draper gave a hint; nor, on the other hand, was it necessary that he should communicate every minute thing about the invention; but he must have communicated the substance."

I regard the new mode of constructing the conduit pipe in detachable sections as the substance of the invention of the complainant, and hence that his patent should be declared void for want of novelty in the invention.

### HAIGHT, Jr., and others v. BIRD.<sup>1</sup>

(*District Court, S. D. New York.* February 1, 1886.)

#### 1. COLLISION—STEAMER AND SAILING VESSEL—EAST RIVER NAVIGATION. EDDY OFF SIXTIETH STREET—CUSTOMARY COURSE.

A steamer coming down the East river, on the westerly side, collided, about off Sixtieth street, with a schooner beating slowly down with the ebb-tide. The general rule required the steamer to keep out of the schooner's way, but the defense was that there is an eddy on the westerly side at that place on the ebb-tide, extending nearly half way across the river, to Blackwell's island; that it is the custom of vessels beating down to tack at the edge of the eddy; that the schooner could not have been expected to come to the westward of the line of the eddy; and that the steamer could not go to the eastward of the schooner, as she expected her to follow the custom of tacking at the edge of the eddy. The schooner did not go so far within the eddy as that her heading was at all affected by it when the collision occurred. *Held*, that the custom must be construed as applying only to that part of the water where the opposite current of the eddy is actually sufficient to affect appreciably the motion of vessels going into it; that a sailing vessel has a right to keep her course till that limit is reached, and the schooner did not exceed this limit; that the steamer could have avoided the collision by going 100 or 150 feet nearer the New York shore, or by stopping and backing, and that she was therefore solely in fault for the collision.

#### 2. SAME—EXCEPTION TO GENERAL RULE THAT SAILING VESSEL MUST KEEP COURSE—WHEN ALLOWED.

The exception to the general rule that a sailing vessel must keep her course cannot be allowed except when it is entirely clear, not only that by changing her course she would in fact have avoided the collision, but that, under the circumstances of the moment, as they appeared to the sailing vessel, that means of escape was so obvious to one of ordinary nautical judgment that it was clear negligence to omit it.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty.

*Alexander & Ash*, for libellant.

*E. Henry Lacombe*, for respondent.

BROWN, J. The former suit of *Haight* against *The Mayor, etc.*, 24 Fed. Rep. 93, having been dismissed on the ground that the respondent in that case was not answerable for the faults of the steamer, this suit has been brought, for the same collision, to recover the damages against the master, who was at the time in charge of the navigation. Some additional testimony has been given, as respects the place of the collision in reference to the eddy in the East river between Sixtieth street and Blackwell's island in the ebb-tide. The steamer being bound to keep out of the way of the schooner, and having plenty of room to do so, the only possible defense is that the steamer had a right to count on the schooner's luffing up and tacking before she had come so far to the westward as the line of the steamer's course. It is urged that, according to the custom of navigation there, the schooner could not have been expected to come at all to the westward of the line of the eddy, and that she did so in this case; that the steamer could not have gone to the eastward of her, because the schooner was expected to tack at the edge of the eddy, and, by going to the eastward, the steamer would have run directly upon the schooner's natural course on tacking.

Upon further consideration of all the testimony, the new as well as the old, I am of the same opinion formerly expressed,—that the steamer was in fault, and the schooner not in fault. The undisputed fact that the schooner's course, although her movement was slow in a light wind, was not at all changed to the northward through any influence of the eddy up to the time of the collision, is conclusive evidence, to my mind, as I stated before, that she was not to any considerable distance within the eddy. The alleged custom for schooners to come about at the easterly edge of the eddy, resting, as it does, solely upon the necessity of avoiding the effects of the contrary movement within the eddy, must be construed as applying only to that part of the water where the opposite current of the eddy is actually sufficient to affect appreciably the motion of vessels going into it. A sailing vessel, in that narrow passage, has the undoubted right to keep her course until, at least, that limit is reached. The schooner in this case did not go beyond that limit. The steamer was bound to give her all this space. She had abundant room to pass to the westward. There was no difficulty in doing so, and she might with ease have avoided this collision, either by going 100 or 150 feet nearer to the New York shore, or by stopping and backing; one or both of which it was her duty to do. There was a further fault in the steamer in this case in that, shortly before reaching the line of the schooner's course, the steamer gave her two short blasts of her whistle. The proper meaning of this signal was that she would starboard her wheel, and go under the schooner's stern, and the schooner so understood

it, (Inspector's Rule 4,) instead of which the steamer kept on attempting to pass the schooner's bows.

It is undoubtedly true that a steamer, in laying her course so as to avoid a sailing vessel, has a right to assume that the latter will pursue the customary course of navigation in narrow channels. The steamer is bound to anticipate that the sailing vessel will tack, and in the customary manner, where there is a definite custom as respects particular dangers. A schooner, in following such a defined practice in tacking, may be regarded either as pursuing her proper course under the circumstances, or as falling within the exceptions of the twenty-fourth rule. But this principle cannot be availed of to excuse a steamer from fault that has abundant room at her own command, when she seeks to shorten the natural course of a sailing vessel in a narrow channel, where the precise margin of the customary course, like that of the border of an eddy, is itself somewhat indefinite, and varies with the different stages of the tide.

In the somewhat analogous case of *The Washington Irving*, Abb. Adm. 336, 338, BETTS, J., observes:

"The officers of the steam-boat had a right to act upon the presumption that the schooner would not be intentionally run in dangerous proximity to the shore, or to a point where she must become disabled or embarrassed in tacking by a loss or change of the current. But if these impediments to her course were not palpable and inevitable, the steam-boat had no right to anticipate any variation of her course by the schooner, and was bound to regulate her proceedings so as to leave the schooner free to be navigated according to the judgment of her master and pilot. They were entitled to determine, at their discretion, the advantage or prudence of continuing her tack beyond the true tide, and even to what might seem to the officers of the steamer a dangerous proximity to the land. The law, under circumstances of uncertainty or doubt in respect to these particulars, imposed on the officers of the steam-boat the duty of taking timely precaution to secure the sailing vessel the free exercise of the discretion of her master in the choice of her course, and the expedients to be adopted in case he should encounter dangers in pursuing it."

These observations are applicable in the present case, and compel me to hold the steamer in fault.

I was at first disposed to regard it as the duty of the schooner to luff when she saw that the course of the steamer was irrevocably fixed to pass ahead of her. No exception to the general rule, that a sailing vessel must keep her course, can, however, be allowed except where it is entirely clear, not only that by changing her course she would in fact have avoided the collision, but that, under the circumstances of the moment as they appeared to the sailing vessel, escape by that means was so easy and obvious to a person of ordinary nautical judgment that it was clear negligence to omit it. That cannot be said in this case. The steamer, in fact, nearly passed clear of the schooner, being struck on her port quarter near the stern. Any luffing by the schooner would have been of doubtful use; and, upon a collision in that event, the schooner would have been left exposed to the clear

charge of fault; since it could not have been said with certainty that, if the schooner had kept her course, the steamer would not have had time before collision to run the few additional feet necessary to clear her.

The libelant is entitled to a decree, with costs, and a reference to compute the damages.

---

THE AGNES BARTON.

McGEE and another v. THE AGNES BARTON.

(*District Court, E. D. Virginia. January 5, 1886.*)

1. MARITIME LIEN — VESSEL IN FOREIGN PORT FURNISHED WITH SAILS — CONTRACT.

If a vessel, after a voyage, comes into a foreign port, (Philadelphia,) and while there is furnished with sails, the lien of the creditor who furnishes the sails is that which is given under the general maritime law; and the fact that the creditor is a resident in the home port of the vessel, (Baltimore,) and furnished the sails under a contract made with the managing owner in the home port, does not affect the lien.

2. SAME—ACCEPTANCE OF NOTE—RELEASE OF LIEN.

The acceptance of promissory note for material furnished a vessel does not release the maritime lien of the creditor for the amount due, unless there is an express release of the lien.

3. SAME—RECEIPT—RESERVATION OF LIEN.

Where the promissory note of the managing owner (who owns seven thirty-seconds) was taken for the amount due for sails furnished a vessel, and, in the receipt given for the note, the words were added, "which satisfies us for said bill, and all claims against said brig, excepting the interest owned by the managing owner." *Held*, that the lien of the creditor was thereby expressly reserved upon the managing owner's share of the vessel; which, being in its nature a remedial right, could be enforced by a libel of the vessel itself.

In Admiralty.

The brig Agnes Barton came into the port of Philadelphia in the spring of 1885, needing repairs and an outfit of sails. Her home port was Baltimore, and her owners were all residents of that city. One of them, S. H. Travers, was managing owner, and had an interest of seven thirty-seconds in the vessel. The brig lay in the port of Philadelphia while the needed repairs were put upon her; and while she was there, the libelants, William McGee & Son, of Baltimore, contracted with S. H. Travers, her managing owner, to furnish her with a suit of sails for \$600, the amount now libeled for. The sails were duly furnished, and were delivered on board the brig while still at Philadelphia. Travers gave in settlement for the price of the sails the note of his firm, S. H. Travers & Son, at four months, indorsed by his son, Geo. C. A. Travers. McGee & Son took this note, and gave a receipt, reciting its contents, and adding the following clause:

"Which satisfies us for said bill, and all claims against said brig, excepting the interest owned by Saml. H. Travers."

To meet the contingency of a decision that the lien for the sails was not as upon a foreign vessel, but as upon a home vessel, and therefore was only such as the laws of Maryland allow upon vessels owned within the state, the libelant duly complied with the requirements of the Maryland statute as to the registration of such liens. The foregoing were the material facts of the case.

*Charles E. Stewart, and A. W. Armstrong, for libelants. Robert H. Smith, for respondents.*

HUGHES, J. I think the lien of McGee & Son for the amount of their bill was upon this brig as a foreign vessel. She was at Philadelphia, a foreign port; and she was furnished while there with the sails. The circumstance that the sails were contracted for and made at the home port of the vessel merely confuses the case, and does not change its nature. The lien attached while the vessel was in a foreign port. It attached as upon a foreign vessel. Its character was determined by the delivery of the sails at that port, and could not be changed by the accident that the sails were made at the home port, under a contract also made there. It is useless, therefore, to consider the technical objections raised by counsel for claimants on the form and time of the registration of the lien in Baltimore. If it were necessary to do so, I would hold that the registration was in accordance with the requirements of the Maryland statute on the subject; and that the lien was good as a lien upon a home vessel. But this is a matter of no importance.

The sails were delivered and received by the brig at the port of Philadelphia, where she was a foreign vessel, and the lien for their price was that which is given by the general maritime law. The case is all fours with that of *The Sarah J. Weed*, 2 Low. 555, in which the ruling was as I have just announced for the case at bar.

The serious question in the case is upon the receipt given by McGee & Son in taking the four-months note of Travers & Son. It is useless to say that the mere taking of a note for a maritime claim does not release the lien of the creditor of a ship for his claim. The note is but an evidence of the debt, and does not operate as a novation of it,—certainly not as between the owner of a ship and its creditor. It concludes both parties as to the amount due, and it postpones the right of the creditor to enforce his lien. If the time for which the note is made to run is too long, other creditors of the ship may be thereby let in to priority over the holder of the note. But the general proposition is true that the taking of a note does not release the lien of a creditor of a ship for his demand, as between the owner and the creditor. There must be an express release, else the lien stands, notwithstanding the taking of the note. In this case, therefore, the question is, did the libelant release his lien upon the brig when he set out in his receipt for the note that it satisfied him

for his claim against the brig, excepting the interest of Travers, which was seven thirty-seconds of the vessel?

It is very certain that he reserved his lien upon the seven thirty-seconds. A lien is in its essence a remedial right. Therefore, in reserving his lien upon an undivided part of the vessel, the libellant reserved his right of attaching under the lien to the full extent necessary to making good his lien upon the seven thirty-seconds. As the vessel is indivisible, and the lien as to a part cannot be enforced, except upon the vessel as a whole, and there was an express reservation of the lien as to the part, I am of opinion that the right to libel the vessel, so far from being expressly released, was expressly reserved.

If it were necessary in this case, I think I should be warranted in holding that, if the share of Travers were insufficient on a sale of the vessel to produce the amount due McGee, he would, under all the proofs that have been submitted, be entitled to full payment out of the general proceeds of sale. But as there is no doubt but that the share of Travers will fully pay the claim of the libellant with interest and costs, this question is not at all likely to arise.

I will decree for the libellant in accordance with these views of the law of the case, and for execution against the stipulators.



## PERRIN, Adm'r, v. LEPPER, Adm'r, and others.

(Circuit Court, E. D. Michigan. January 4, 1886.)

## 1. PARTNERSHIP—ACCOUNTING BETWEEN ADMINISTRATOR OF ONE PARTNER AND ADMINISTRATOR DE BONIS NON OF ANOTHER PARTNER.

A bill was filed in a state court by the administrator of one partner against the administrator *de bonis non* of another partner, to obtain a settlement of the partnership accounts, and of certain land transactions between the partners, and also to compel an adjustment of the accounts of the complainant's intestate as executor of his partner's will. Both these parties were residents of the same state. The sole legatee under the will of the deceased partner, who was also a resident, and the heirs at law of such partner, who were all non-residents, were also made defendants. The non-resident heirs at law removed the case to the federal court, upon the ground that it involved one controversy between them and the resident legatee, and another between them and the resident complainant. *Held*, that the complainant was a necessary party to the controversy between the non-resident heirs and the resident legatee, and that the other resident defendants were also necessary parties to the controversy between the non-resident heirs and the complainant, and that the cause should be remanded.

## 2. SAME—PARTIES TO SUIT.

Where a party occupies a neutral position, and is in a manner a stakeholder or trustee, or is otherwise bound to account to one of two other parties, he is an indispensable party to the controversy between them, if he still has possession of the fund to be accounted for.

In Equity. On motion to remand.

This was a bill by Joel J. Perrin, administrator of the estate of Horace J. Perrin, deceased, a citizen of Michigan, against Stephen V. R. Lepper, administrator *de bonis non* of the estate of Joseph Sibley, deceased, Anna L. Fisk, daughter-in-law and legatee under the will of Joseph Sibley, also citizens of Michigan, and numerous other parties heirs of Joseph Sibley, all residents of other states, and known collectively as the "Sibley heirs." The object of the bill was to obtain a settlement of the accounts of the firm of H. J. Perrin & Co., of which Horace J. Perrin and Joseph Sibley were the members; and also a settlement of the accounts of Horace J. Perrin as executor of the will of his partner Joseph Sibley. The facts were substantially as follows: Prior to 1864 Horace J. Perrin and Joseph Sibley composed the firm of H. J. Perrin & Co. There was also some evidence tending to show that Darius Perrin was a member of the firm, but this was immaterial. Perrin and Sibley were also tenants in common of certain real estate, consisting principally of what was known as the "Kalamazoo River Mill Property." In September, 1864, Sibley died, and Perrin, his surviving partner, became his executor and as such took possession of his estate. In January, 1880, Perrin died, without having accounted either as executor or as surviving partner, and the complainant, Joel J. Perrin, was appointed administrator of his estate, and the defendant Lepper administrator *de bonis non* of the estate of Sibley. While Perrin was nominally the complainant in this bill, the suit was substantially by Lepper

against Perrin, to compel an account of the administration of Sibley's estate, including the copartnership affairs of H. J. Perrin & Co., and to obtain a decree for the balance found to be due upon such accounting. Defendant Mrs. Fisk, and the so-called "Sibley heirs," each claimed the estate of Sibley,—the former as the widow and sole legatee of the son of Joseph Sibley, who was also the sole legatee of his father; the latter as the collateral heirs of Joseph Sibley, who claimed that the estate never vested in his son, but upon his death passed to them under the will of Joseph Sibley. After the case was put at issue by the filing of the usual replication, the Sibley heirs, who were over 40 in number, filed their petition for the removal of the case to this court, setting forth that the suit involved a controversy between Mrs. Fisk individually and as executrix of the will of her deceased husband on the one side, and all of the Sibley heirs on the other, respecting the construction of the last will and testament of Joseph Sibley, deceased, in order to determine which of said parties to such controversy were the actual owners of the Sibley estate, and entitled to receive whatever might be recovered of the complainant in behalf of such estate in this suit, and also that the entire case upon its merits involved a controversy between complainant, a citizen of Michigan, on the one side, and the Sibley heirs on the other, all of whom were non-residents.

*S. T. Douglass*, for Mrs. Fisk.

*M. J. Smiley*, for complainant.

*L. P. Perkins*, for the Sibley heirs.

**Brown, J.** The original bill against Lepper, Mrs. Fisk, and Darius Perrin was filed with a triple object: (1) To settle the partnership accounts of H. J. Perrin & Co., of which firm Darius was said to have been a member; (2) to settle the accounts of Horace J. Perrin as executor of the will of his partner, Joseph Sibley; (3) to settle his account as tenant in common with Joseph Sibley of certain real estate, upon which he had made large expenditures of money.

Defendant Mrs. Fisk, who was the widow and sole legatee of Francis M. Sibley, himself the son and sole legatee of Joseph Sibley, demurred to the bill upon the ground, among others, that the relief sought by the bill involved the question whether she or the Sibley heirs were entitled to the estate of Joseph Sibley. This demurrer was practically sustained by the supreme court, (*Perrin v. Lepper*, 49 Mich. 347; S. C. 13 N. W. Rep. 768,) and the bill was subsequently amended by making the Sibley heirs parties. These heirs, who are all non-residents, petitioned for the removal of the case to this court, upon the ground that the suit involved a controversy between Mrs. Fisk and themselves, concerning the construction of the will of Joseph Sibley, and a determination of the question which of the two is entitled to his estate. The case, as to citizenship, stands then in the following position. The complainant, Perrin, adminis-

trator of the estate of Horace J. Perrin, one member of the firm, is a citizen of Michigan. Defendant Lepper, administrator *de bonis non* of the other partner, and defendant Fisk, who claims the estate of Sibley as legatee, are also citizens of Michigan. The Sibley heirs, who claim adversely to her, are all citizens of other states. Does the case involve a controversy wholly between citizens of different states, which can be fully determined as between them, within the meaning of the second clause of the second section of the act of 1885? It is conceded that if there be such a controversy the fact that it is between two defendants, instead of being between two opposite parties, is immaterial. It was held in the *Removal Cases*, 100 U. S. 457, that, for the purposes of a removal, the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on the opposite sides of that dispute, and that if, in such an arrangement, it appears that those on one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed. While the act demands as a requisite of removability only the existence of a controversy between citizens of different states, it has always been construed to authorize a removal only in those cases where the controversy was *wholly* between parties of diverse citizenship, and where the other parties, whose presence would oust the jurisdiction of the court, were not necessary or indispensable parties to such controversy. If, for example, the controversy be between a resident plaintiff and a non-resident defendant, and there be also a resident defendant who is an indispensable party to such controversy, the case cannot be removed. So, if the controversy be between a resident and non-resident defendant, and the plaintiff be a resident and a necessary party, the jurisdiction is also defeated. This construction was first given to the act of 1867 in the *Sewing-Machine Cases*, 18 Wall. 553, and was also applied to the act of 1875 in *Blake v. McKim*, 103 U. S. 338, and repeated in *Hyde v. Ruble*, 104 U. S. 407.

In this case it is claimed there are two controversies, the existence of either of which is sufficient to confer jurisdiction, viz.: a controversy between the complainant, Perrin, and the non-resident Sibley heirs, to which Mrs. Fisk and Lepper, the resident defendants, are not necessary parties; and another between the Sibley heirs and the defendants Fisk and Lepper, to which the complainant is not indispensable. Two cases are claimed to be decisive in favor of our jurisdiction; but upon examination we are satisfied that neither of them has any bearing upon the question under consideration. In the *Removal Cases*, 100 U. S. 457, a resident construction company brought suit against a resident railroad company to enforce a mechanic's lien, and in the petition priority was claimed for this lien over that of a mortgage held by non-resident trustees. Process was served only upon the railway company, which appeared and filed an answer, contesting only the amount due. The case was referred, and upon the referee's

report a judgment was entered up in favor of the construction company. Subsequently the non-resident trustees of the mortgage appeared in answer to a summons by publication, and removed the case to the federal court, and the question was made whether the suit involved a controversy between citizens of different states, within the meaning of the first clause of the second section of the act. The court held that it did, and put its decision expressly upon the ground that, "before the trustees of the mortgage were actually brought into court by service of process, the dispute between the railroad company and the construction company had been finally disposed of. The amount due the construction company had been ascertained, so far as that company and the railroad company were concerned, the mechanic's lien established, and the property sold under the lien to pay the debt. There was after that nothing left of the suit, except that part which related solely and exclusively to the priority of the mortgage lien, and, as to this, the controversy was between the construction company on the one side, and the mortgage trustees on the other. If the railroad company still continued a party to the suit, it was a nominal party only, and its interests were in no way whatever connected with those of the trustees." The case of *Barney v. Latham*, 103 U. S. 205, is equally inapplicable. In this case a bill was filed by a resident plaintiff against a resident land company, to obtain possession of certain land contracts and securities in the hands of the company, and also against certain non-resident defendants, for an account of the sales of land made by them before the title to the lands was conveyed to the land company. It was held that there were two distinct controversies in this case: one between the plaintiffs and the land company, to the full determination of which the other defendants were not in any legal sense indispensable parties; and another against the individual defendants for an account due upon sales prior to the conveyance to the land company, and that that was a controversy with which the land company had no necessary connection. It was said that if the suit sought no other relief than a decree against the non-resident defendants, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue, and that the controversy did not cease to be one wholly between the plaintiff and those defendants because the former, for their own convenience, chose to embody in the complaint a distinct controversy between themselves and the land company.

The question in each case is whether the party whose presence would defeat the jurisdiction is an indispensable party to the controversy between the parties who are citizens of different states. Subsequent cases have fully established the doctrine that where a party occupies a neutral position, and is in a manner a stakeholder or trustee, or otherwise bound to account to one of two other parties, he is an indispensable party to the controversy between them, *if he still has possession of the fund or property to be accounted for*. Thus, in *St.*

*Louis, etc., R. Co. v. Wilson*,<sup>1</sup> plaintiff, a citizen of Missouri, filed his bill against a Missouri corporation and two citizens of New York, to compel the company to transfer to him on its books certain shares of its capital stock standing in the name of the New York parties, and to issue to him certificates therefor. It was held that this could not be done without the presence of the company, for the decree must operate upon the company itself; that the non-resident defendants were made parties only in aid of the principal relief which was asked, and for the purpose of protecting the company in case a transfer of the stock was ordered to the plaintiff upon the final hearing. Substantially the same ruling was made in *Crump v. Thurber*, 115 U. S. 56; S. C. 5 Sup. Ct. Rep. 1154; and the like principle was also asserted in *Winchester v. Loud*, 108 U. S. 130, S. C. 2 Sup. Ct. Rep. 311, and in *Thayer v. Life Ass'n*, 112 U. S. 717, S. C. 5 Sup. Ct. Rep. 355. In *Bailey v. New York Sav. Bank*, 2 Fed. Rep. 14, an action was brought by a widow to recover moneys deposited by her husband in a New York savings bank. On petition of the bank, under a state statute, the alleged executor of the decedent, a resident of Connecticut, was made a party defendant. The bank subsequently put in an answer, setting up that it could not ascertain which of the two claimants was entitled to the money, and prayed that, when all the parties necessary to render the judgment of the court a protection to it should be brought in, such parties might interplead and settle their rights among themselves, and that the bank might pay the money into court to await the final determination of the action. It was held by Mr. Justice BLATCHFORD that until the moneys had been paid into court, and its liability for the deposit had ceased, the bank was a necessary party to the suit, and the cause could not be removed under the act of 1875. See, also, *Moore v. North River Const. Co.*, 19 Fed. Rep. 803. The case of *Ex parte Grimbail*, 61 Ala. 598, is directly in point. Plaintiff, the trustee of certain property under a will, filed a bill against parties claiming the property, viz., the brothers and sisters of the deceased, her administrator, and her husband, for the settlement of his trust, and for instructions as to the disposition of the property. All the parties except the husband, who resided in New York, were residents of Alabama. It was held that he was not entitled to remove the case to the federal court, inasmuch as the complainant was a necessary party to the controversy between himself and the other defendants.

In the case under consideration it is entirely possible that a bill might have been brought by the complainant against Lepper alone, to settle the accounts of the partnership and the executorship, and neither the legatee nor the heirs of Sibley would have been indispensable parties to such a bill; but as the bill also involves the settlement of certain accounts between partners as tenants in common, and the

<sup>1</sup> 114 U. S. 60; S. C. 5 Sup. Ct. Rep. 738.

disposition of certain real estate held by them, both the legatee and the heirs, who each claim the entire estate, would seem to be necessary parties. Such appears to have been the ruling in the state courts, and we have no disposition to criticise it. So, also, it is possible that a suit might have been brought by the Sibley heirs against Mrs. Fisk, to determine their respective rights to the estate of Sibley, without making either Perrin or Lepper parties. But that does not answer the question presented here, whether, in this case, Perrin is not a necessary party. Under the authorities above cited, we are clearly of the opinion that he is. The amended bill prays that an account may be taken of the dealing of Horace J. Perrin with the real estate held by him and Sibley in common, and that the balance due Perrin may be ascertained and liquidated, and decreed to be paid out of the assets of the Sibley estate, and be also decreed to be a lien upon Sibley's share of the property, and that it may be sold, and out of its proceeds the amount due the estate of Perrin may be paid; that the Sibley heirs may be made parties defendant, and the court may decree whether they have any rights or interests in his estate, or any right to an accounting with the complainant in respect thereto, and which of said parties, viz., the heirs of Sibley or Mrs. Fisk, be entitled to such accounting; and that the same may be final and conclusive, and a bar to any further claim against the Perrin estate. It is neither the object of the complainant nor of the Sibley heirs to determine, as an abstract proposition, whether they or Mrs. Fisk are entitled to the Sibley estate, but which of them is entitled to the benefits of the accounting between the complainant and the administrator with respect to the affairs of the partnership and the executorship, and between the complainant and the proper heirs and devisees of the real estate with respect to the lands held by them in common. To this controversy it is clear that the complainant is an indispensable party. It is also entirely clear that, to the controversy between complainant and the Sibley heirs, Lepper, the administrator of Sibley, is a necessary party. We are satisfied the court has no jurisdiction of the case.

The view we have taken of this branch of the case renders it unnecessary to discuss the remaining grounds of the motion. The case will be remanded to the circuit court for the county of Calhoun.

## NORTHERN PAC. R. CO. v. ST. PAUL, M. &amp; M. RY. CO. and others.

(Circuit Court, D. Minnesota. March 3, 1886.)

## RAILROAD LAND GRANTS—INTERSECTING GRANTS—TITLE OF NORTHERN PACIFIC RAILROAD COMPANY AND ST. PAUL, MINNEAPOLIS &amp; MANITOBA RAILWAY COMPANY AT GLYNDON.

The title of the Northern Pacific Railroad Company to the lands embraced in the land grants to it and to the companies from which the St. Paul, Minneapolis & Manitoba Railway Company derived title where such roads cross at Glyndon, Minnesota, antedates and is superior to the title of the St. Paul, Minneapolis & Manitoba Railway Company.

BREWER, J. The two principal contestants in this case are land-grant railroad companies. Their lines cross at Glyndon; and the contest is as to the title to lands in the vicinity of this crossing, and embraces lands in place, indemnity lands, and lands within withdrawal limits. The first inquiry naturally runs to lands in place.

Congress, by different acts, at different times, grants the alternate odd-numbered sections on either side to two roads. Their lines cross. In the vicinity of the crossing, obviously, certain sections are within the letter of each grant. Which takes the title? In view of the many land grants it was to be expected that this question would early arise. It has arisen, and the primary rule of determination been settled. First it was held that, upon construction of the road, the grant took effect, and, by relation, as of the date of the act making the grant. "The grant then becomes certain, and, by relation, has the same effect upon the selected parcels as if it had specifically described them." *Railroad Co. v. U. S.*, 92 U. S. 741. "The grant takes effect upon the sections, by relation, as of the date of the act of congress. In that sense we say that the grant is one *in presenti*. It cuts off all claims other than those mentioned, to any portion of the lands, from the date of the act, and passes the title as fully as though the lands had been capable of identification. *Van Wyck v. Knevals*, 106 U. S. 365; *S. C. 1 Sup. Ct. Rep. 336*; *Railway Co. v. Alling*, 99 U. S. 475; *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 498." And then, as a corollary, the supreme court ruled that as between two roads, not priority of construction, nor priority of location, but priority of grant determined the title:

"The construction thus given to the grant in this case is, of course, applicable to all similar congressional grants, and there is a vast number of them, and it will tend, we think, to prevent controversies between the grantees and those claiming under them respecting the title to the lands covered by their several grants, and put an end to struggles to encroach upon the rights of others by securing an earlier location. Our judgment is that the title of the plaintiff, attaching to the lands in controversy by a location of the route of the road, being followed by a construction of the road, took effect, by relation, as of the date of the act of 1862, so as to cut off all intervening claimants, except in the cases where reservations were specially made in that act, and the amendatory act of 1864. \* \* \* The grant made was in the

nature of a float, and the reservations excluded only specific tracts, to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the government. It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads." *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491.

The rule thus established easily settles most similar controversies. Comparing the date of one act of congress with that of another is all that must be done. Unfortunately in this case the solution is not so simple and easy. Which road has the prior grant? A reference to the legislation is necessary. The title of the Northern Pacific Railroad Company to these lands rests upon the act of July 2, 1864. 13 St. at Large, 265. The third section contains the grant:

"And be it further enacted, that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: provided, further, that the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected, as above provided."

The road having been constructed, the grant, by relation, takes effect as of that date, July 2, 1864. Of this there can be no doubt. The defendant claims that its grant was made by the act of March 3, 1857, more than seven years prior. This is the matter in dispute. The first section of the act of 1857 makes this grant:

"That there be, and is hereby, granted to the territory of Minnesota, for the purpose of aiding in the construction of railroads from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake



and the mouth of Sioux Wood river, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the legislature of said territory may determine, every alternate section of land designated by odd numbers, for six sections in width, on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said territory or future state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid, which lands thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with sections and parts of sections designated by odd numbers, as aforesaid, and appropriated as aforesaid, shall be held by the territory or future state of Minnesota for the use and purpose aforesaid: provided, that the land to be so located shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said lines or branches: provided, further, that the said lands hereby granted for and on account of said roads and branches severally shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever; and provided, further, that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the president of the United States."

The "branch via St. Cloud," etc., is the line which crosses the Northern Pacific road at Glyndon, and presents the matter in dispute. The legislature of Minnesota named St. Vincent, a place on the northern boundary of the state, as the terminal point on the Red river. At first, the Minnesota & Pacific Railroad Company was made the beneficiary of this grant, but subsequently, and on March 10, 1862, by proper legislative action, the St. Paul & Pacific Railroad Company, of which the principal defendant is the successor, became the beneficiary. On July 12, 1862, a portion of this grant was vacated by resolution of congress, as follows:

"Be it resolved by the senate and house of representatives of the United States of America in congress assembled, that in lieu of that part of the railroad grant to Minnesota territory by act of congress, approved third of March, 1857, which extends north-westerly from the intersection of the tenth standard parallel with the fourth guide meridian, there shall be granted to the state of Minnesota the alternate sections, within six-mile limits of such new branch line of route, as the authorities of the state may designate, having its southwestern terminus at any point on the existing line, between the falls of St. Anthony and Crow Wing, and extending in a north-easterly direction to the waters of Lake Superior, with a right of indemnity between the fifteen-mile limits thereof: provided, this resolution shall take effect from the filing in

the general land-office of the acceptance by the authorities aforesaid of such substitution, whereupon the land north of the intersection aforesaid in the grant, as authorized by the said act of third March, 1857, being by said acceptance disincumbered of the railroad grant, shall be dealt with as other public lands of the United States."

The proper acceptances were filed, so that the proposed change became operative. On March 3, 1865, congress passed an act enlarging the grant of 1857 to 10 sections per mile, the ninth section of which reads as follows:

"And be it further enacted, that the provisions of this act shall also be construed so as to apply and extend to that portion of the line authorized to be vacated by the joint resolution approved July 12, 1862, entitled "A joint resolution authorizing the state of Minnesota to change the line of certain branch railroads in said state, and for other purposes; notwithstanding the vacation thereof by said state, as though said joint resolution had not passed, and also to the line adopted by said state in lieu of the portion of the line so vacated."

On March 3, 1871, congress passed a further act entitled "An act authorizing the St. Paul & Pacific Railroad Company to change its line, in consideration of a relinquishment of lands," which reads:

"Be it enacted, etc., that the St. Paul & Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct in lieu thereof a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands, to be taken in the same manner, along said altered lines as is provided for the present lines by existing laws: provided, however, that this act shall only take effect upon condition of being in accord with the legislation of the state of Minnesota, and upon the further condition that proper releases shall be made to the United States by said company of all lands along said abandoned lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that, upon the execution of said releases, such lands so released shall be considered as immediately restored to market without further legislation."

Counsel for defendant speak of these odd-numbered sections as "granted by act of congress of March 3, 1857, and located under the act of congress, March 3, 1871." Now, if this is a fair description of defendant's title, its grant is, of course, of prior date, and we must look to the exceptions named therein for any support of complainant's title. I am unable to agree with counsel in this respect. Reading the legislation of congress as interpreted by the geography of the state, it is obvious that prior to the act of March 3, 1871, there was no thought of a road down the valley of the Red river, or crossing the Northern Pacific line within a hundred miles of Glyndon, and the fair construction of that act makes a new grant in lieu of one revoked. The grant of 1857 was for a branch road, via St. Cloud and Crow Wing, to St. Vincent. Where a grant is made to aid in the construction of a road between two named *termini*, the amount of the grant being proportioned to the length of the road, the necessary implication is

that the road is to be constructed in as direct a line between such *termini* as the topography will reasonably permit. No gigantic bow, adding from 30 to 50 per cent. to the amount of the grant, can be considered within the contemplation of the grantor. A road passing through St. Cloud and Crow Wing will, in a direct line towards St. Vincent, course a little north of north-west; while, to go from Crow Wing to Glyndon, the road will pass about a hundred miles nearly due west; and then, to reach St. Vincent, turn at almost a right angle, and run north down the Red River valley. The most casual glance at the map shows that no such line was in the thought of congress when it passed the act of March 3, 1857; but if there were any possible doubt after a consideration of this act alone, that doubt is removed by the act of July 12, 1862. That vacates this grant, north-westerly "from the intersection of the tenth standard parallel with the fourth guide meridian." This furnishes in the thought of the grantor a new point on the line of the intended grant, viz., the point of intersection, etc. Now, this point is on the direct line from Crow Wing to St. Vincent, and is ninety miles east and six miles north of Glyndon. Of course, this excludes the idea of a line which, to reach St. Vincent via Glyndon, must turn on itself, come south six miles, then west ninety miles, and then, at a right angle, push directly north to its terminus. It is true, this named point of intersection lies 40 miles north of the Northern Pacific line, and if the road had been constructed so as to earn that grant it would have crossed the road of complainant, and obtained a prior title to the land within the conflicting limits. But, without subsequent legislation, the construction of a road on the present line would have given defendant no pretense of title to any lands within the limits of complainant's grant; for, while the act of 1857 made no definite location of the line of road, therefore did not designate the precise sections granted, and so had some of the elements of a float, yet it did define the general boundaries of the grant, was in no complete sense a float, and did not give a right to lands wherever, in the unoccupied public domain, the grantee might see fit to build its road.

Turning now to the act of 1871, and what is its fair construction? Bear in mind that at that date there was an existing grant, whose general boundaries were indicated, unearned, and along a line of road which had not been built and might never be. The title to the act suggests its purport. Authorizing a change of line "in consideration of relinquishment of lands." Evidently a vacation of some existing grant was the condition—the consideration—of whatever congress was proposing to give by this act. The act itself provides, first, that the donee may, in lieu of certain authorized branch lines, construct certain other branch lines and that along these new lines it may have the same proportional grant, upon two provisos: *First*, accord with the legislation of Minnesota; and, *second*, a full relinquishment of all claims to land along the original branch lines, which land it was fur-

ther enacted should then be immediately restored to market. Could anything be clearer than that, upon the acceptance of this act, the old grant was surrendered, and in lieu thereof a new one taken. The act does not provide for relocating existing branches, but for new ones in lieu of those existing. It does not transfer an existing grant, but makes a new grant of a proportional amount along the new lines, and requires, as a condition, a formal release of "all lands along said abandoned lines." I am aware that the force of the foregoing argument is somewhat weakened by the fact that in 1869 the St. Paul & Pacific Company caused a survey and location to be made of a line from Crow Wing towards St. Vincent, such line passing westerly from Crow Wing about half the distance towards Glyndon, then turning north, and passing between Otter Tail and Rush lakes in the direction of St. Vincent to a point about 15 miles north of the tenth standard parallel. This line, if extended to St. Vincent, would have run about half way between the present constructed road from Glyndon northward, and a line running directly from Crow Wing through the point of intersection named in the act of 1862. A map of this survey and location was filed in the office of the secretary of the interior on December 9, 1869, but never accepted by that department; the secretary holding that *prima facie* it was an unwarrantable departure from the true line, and that before acceptance proof must be made that a direct route was impracticable. Now the act of 1871 names as one of the new branches a line "from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush lake." This, it is claimed, is congressional recognition of that survey and line, and an implied assent to the claim of the company that such line was within the scope of the original granting act. There is doubtless truth and force in this, but not sufficient, in my judgment, to overthrow the conclusions reached from the other facts. These reasons suggest themselves. It is obviously inconsistent with the act of 1862. The description may have resulted from congressional ignorance of geographical facts. As all that was sought was description of the new line, anything which would make that plain was in order, and should not be carried beyond the mere purpose of description. As this survey of 1869 was the only one on file in the department or as yet made by the company, a reference to that would give the most certainty to the description. The act was passed long after the grant to the Northern Pacific, and no mere implication should defeat or limit that grant. The road, as constructed, nowhere runs within 20 miles of that line, and at the point of crossing the Northern Pacific is more than 30 miles distant. While, as between the government and its grantee, any departure is waived if not insisted upon by the former, yet, as between two donees contesting for rights in the same lands, large departures ought certainly to have weight in determining title. My conclusion, then, from the foregoing is that the Northern Pacific grant is prior.

But this only introduces me to another question: Assuming the priority of the Northern Pacific grant, it is earnestly contended that by its terms all subsequent grants made prior to the definite location of its road are excepted. The definite location, it is conceded, was not made until after the act of 1871. The difference between the language of the grant to the Union Pacific, construed in 97 U. S., *supra*, and that in the grant to the Northern Pacific, is the basis of this argument. The former grant reads thus:

"Five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." 12 St. at Large, 492, § 3.

In the latter we find these words:

"And whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office, and whenever, or prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The question is as to the intent of congress in these acts; for as to its power as owner to dispose of these lands as it pleases there can be no question. In *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 497, the supreme court said:

"It is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that where no such power exists instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other causes, to the legislative will."

We are not limited, therefore, to the technical force and meaning of terms as used in conveyances and contracts between individuals. We must construe this act as any other law of congress, and ascertain from all means at command the intent of the legislator. Stress is laid on the use of the word "granted" in the one act, and its omission from the other. This word it is claimed has a well-recognized meaning in the land legislation of congress, distinct from "sale," "pre-emption," and "homestead." Its use indicates the intention of future grants within this territory, and notifies the grantee that such future grants, if made before its definite location, will have precedence. In fact it reserves from this all such future grants. The vastness of this grant, and the wide range given for the location of

the road, are suggested as reasons why congress increased the exceptions previously made in the Union Pacific act. The fact, as stated, that this is the only land-grant act in which this word is used in a similar connection is noticed as evidence of the intent. At the hearing, the arguments in favor of these views were forcibly presented, and seemed to me very persuasive. Subsequent reflection has led me to a different conclusion. I state briefly my reasons. The decision in 97 U. S., *supra*, places all land-grant roads on the same plane,—and that, a different one from that occupied by settlers and private purchasers,—and settles all conflicts of title by a rule clear, simple, and just, viz., priority of grant. Congress may fairly be regarded as standing indifferent between all roads, and intending to apply this just and simple rule of priority as between successive beneficiaries. Before any departure from such intent is adjudged, the fact should be made clear. The burden is on the later beneficiary averring such departure. The language of each act is broad, and covers every possible disposition by the government intermediate the act and the location: "Sold, reserved, or otherwise disposed of" in one; "reserved, sold, granted, or otherwise appropriated," in the other. Is any term broader or more comprehensive than "disposed of?" Used in a similar private contract between individuals, would any one doubt the sweep of the exception? Yet the supreme court ruled that it did not except "any portion of the designated lands for the purpose of aiding in the construction of other roads." Counsel would limit the scope of the term on the principle *noscitur a sociis*. The use of the qualifying word "otherwise" makes against the application of that principle. But, giving it full force, is not a grant a disposition kindred to a sale, if not a reservation? Counsel's argument rests on the technical force of the phraseology, while I understand the supreme court to base the rule on the presumed attitude of congress towards such public improvements. While the grant is vast, the line to be constructed in order to earn it is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is fairer to presume that congress intended the freest bounty, rather than to believe that it burdened the grant with extra exceptions, which, when construction became feasible, might largely deplete it of value. Further, congress had in thought at the time other railroad grants, and in the first proviso made special provision therefor. It there deducted from this grant any lands theretofore granted to any road whose line should prove to be upon the same general route, and authorized consolidation of companies. Without consolidation, the Northern Pacific would fail of such lands, and that without any right of indemnity elsewhere along its line. If further special provision for conflict with other land grants was intended,

would not such intention have been made manifest by further proviso, or at least by language of unmistakable import. I can but think the rule laid down in 97 U. S. *supra*, applicable to the Northern Pacific land grant, and therefore must hold that its title to the lands in place antedates that of the defendant.

But it is said that the Northern Pacific is estopped from claiming title to these lands. The defendant claims title by foreclosure of a mortgage given by the St. Paul & Pacific Company of date April 1, 1871. At the time of the passage of the act of March, 1871, as well as at the time of the execution of the mortgage just referred to, the Northern Pacific Company was the owner of substantially all the stock in the St. Paul & Pacific Company, elected its directors, and controlled its actions. The act of March, 1871, was passed at the instance of the Northern Pacific. The bonds secured by said mortgage were negotiated by a committee representing the mortgagor, but really named by the Northern Pacific Company. The bonds were headed: "First mortgage bond upon 348 miles of railroad and 2,217,200 acres of land." The bond also referred to the accompanying mortgage, and its recitals, so far as they bear on this matter, are as follows:

"And which conveys also to the said trustees all the right, title, and interest which the company last aforesaid now has, or shall or may hereafter acquire, by the construction of said railroads, or any part thereof, or otherwise, in, to, or concerning certain lands situate in the said state, which were heretofore granted by the congress of the United States to aid in the construction of such railroads, by acts of the said congress approved, respectively, March 3, 1857, March 3, 1865, and March 3, 1871, the extent and aggregate area of such lands to which said company will become entitled by the construction of said railroads, under existing legislation, being estimated at two millions two hundred and seventeen thousand and two hundred acres, more or less."

The granting part of the mortgage alluded to the lands in the following terms:

"And also all right, title, and interest which said party of the first part now has, and all right, title, and interest which the said party of the first part, its successors or assigns, shall or may at any time hereafter acquire, by reason of the construction of said railroads, or of either, or of any part of either thereof, or otherwise, in, to, or concerning the lands situate, lying and being in the state of Minnesota, which are embraced, or intended to be embraced, in the grants aforesaid, or either of them, made by the congress of the United States to the former territory and present state of Minnesota by the acts of said congress hereinbefore mentioned, or either of them, and which have been granted by said state to the party of the first part, or shall or may be granted or conveyed to the said party of the first part, its successors or assigns, to aid in the construction of the said lines of railroad, or of either, or of any part of either thereof."

In order to make the number of acres named, the grant must have been full. Now, I fail to see how anything done before the issue of these bonds can have any bearing on the matter of estoppel. If the Northern Pacific owned both properties, why could it not secure any

legislation it wished in reference to either without wronging any one? Perhaps the change in location of branches may have been to the interest of the Northern Pacific, but it was no more than taking money out of one pocket and putting it in another. All belonged, both before and after the change, to the Northern Pacific. Assuming that the Northern Pacific is responsible for the representations in the bonds and mortgage as having put the words in the mouth of the mortgagor, I cannot think there is anything in them to preclude it from asserting any legal title it may have to these lands. The representation was in terms only an estimate. The line of the road had not been definitely located. Its exact length could not be positively affirmed. The distance given was of course only an approximation. The grant was proportioned to the length. Suppose there had been no conflict of grant, and the road, as built, had fallen short eight miles of the distance named, would the Northern Pacific have been bound to make up the deficiency in the area of the grant? Parties are assumed to act and negotiate on the basis of a knowledge of general and notorious facts. The acts under which the grant was made were named in the instruments. The extent and limitations of the grant were thus declared. Nowhere is it suggested that the grant would be satisfied by the lands in place, and no recourse necessary to the indemnity limits. It was generally known that the country along the proposed line was sparsely occupied. It may have been expected that little recourse would be necessary to the indemnity limits, but the facts were stated, and the purchaser of the bonds took his chances thereon. But counsel urge, according to the present claim of the Northern Pacific, the lands within its limits were not included in the St. Paul & Pacific grant, and therefore for them there could be no indemnity. Assume that such is the correct construction, yet the representation contains no intimation that the Northern Pacific intended to waive its legal rights. Nothing was concealed. The sources of title were disclosed. The limitations therein were patent. If assurance from the Northern Pacific was desired, it should have been asked. The purchasers took all chances as to the construction of either road, and were bound to assume that each would claim and receive its legal right. To sustain an estoppel under these circumstances would carry the doctrine far beyond any adjudicated case, as well as beyond the demands of equity and justice.

I turn now to the consideration of the contest, so far as it relates to lands within the withdrawal limits of the Northern Pacific. On August 13, 1870, a map of the general route to the western boundary of Minnesota was filed in the interior department, and a withdrawal made by that department. Subsequently, and on October 12, 1870, an amended map of general route was filed and a second withdrawal made. This second withdrawal is the only one to be considered, for lands not within its limits were restored. This withdrawal was before the act of 1871. Was the grant made by that act inoperative



within its limits? The withdrawal was in terms "from sale, pre-emption, homestead, and other disposal." The act of 1857 contains this proviso:

"And provided, further, that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the president of the United States." 11 St. at Large, 196.

The act of 1865 contains a similar provision, and the act of 1871 provided that the grant "be taken in the same manner, along said altered lines, as is provided for the present lines by existing laws," so lands reserved from disposal by competent authority at that date were in terms excepted from the grant. Both the validity and extent of this withdrawal are challenged. Its invalidity is asserted on the ground that no map of the entire general route to the Pacific, but only of that portion extending to the western boundary of Minnesota, had been filed, and the case of *Railroad Co. v. Herring*, 110 U. S. 27; S. C. 3 Sup. Ct. Rep. 485, is cited. I do not think that case in point, or the reason sufficient. In that case the contest was between the railroad company and parties making private entries of lands within the indemnity limits. No withdrawal had in fact been made, and only a map of part of the route filed. The court held that no right of selection of indemnity lands accrued until the amount to be selected had been ascertained by the definite location of the entire route; that the filing of a partial map did not operate as a withdrawal, or compel a withdrawal, and, there having been no withdrawal, the right of private entry was undisturbed. I do not understand it to deny the power of withdrawal or its effect if made. It surely is no reversal of prior decisions in respect to withdrawals. The matter of withdrawals was fully considered in the *Des Moines River Grant Cases*. *Wolcott v. Des Moines Co.*, 5 Wall. 681; *Williams v. Baker*, 17 Wall. 144; *Homestead Co. v. Railroad Co.*, Id. 153; *Wolsey v. Chapman*, 101 U. S. 755; *Dubuque R. Co. v. Des Moines R. Co.*, 109 U. S. 329; S. C. 3 Sup. Ct. Rep. 188.

The grant in those cases was as follows:

"For the purpose of aiding said territory to improve the navigation of the Des Moines river from its mouth to the Raccoon Fork, so called, in said territory, one equal moiety, in alternate sections, of the public lands, in a strip five miles in width, on each side of said river."

No withdrawal was in terms authorized, yet a withdrawal was in fact made extending not merely to the Raccoon Fork, but above it, to the northern boundary of the territory. The supreme court held that the grant only extended to the Raccoon Fork, but sustained the validity of the entire withdrawal. In 5 Wall. *supra*, the court said:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river, first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of eighth of August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the land-office to reserve from sale the lands embraced in the grant; otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by congress, for any of these public purposes, to a state, notice is given by the commissioner of the land-office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads."

And also, in the same case, it was held that a railroad grant of like import with that in question here was not operative within the limits of the withdrawal.

Again, the extent of the withdrawal is challenged. While no express direction or withdrawal is found in the Northern Pacific act, yet its language contemplates a withdrawal, but only from "sale, entry, and pre-emption," and therefore impliedly forbids a withdrawal for any other purpose, and the case of *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, S. C. 5 Sup. Ct. Rep. 566, is cited as authority. That case decides that where an act directs the secretary of the interior, upon the filing of a map of general route, to withdraw certain lands from "sale," the filing of the map has no further force than to carry into effect the law, and does not operate as a withdrawal from homestead and pre-emption. *Expressio unius est exclusio alterius* was invoked. But here there was no express direction of withdrawal. The general powers of the land department were not limited. The withdrawal was in fact made. It was in existence and a public record in the offices at Washington at the time the act of 1871 was passed. Congress may be presumed to have acted with knowledge of this fact. If it had intended to stamp with the seal of disapprobation this act of the land department as a usurpation of authority, it could easily have expressed that intent in clear and unmistakable terms. On the contrary, its language seems rather an approval of the action of that department, and to make a grant subject to the reservations created thereby. I can come to no other conclusion than that the withdrawal was valid, and that the grant to the St. Paul & Pacific never had operative force within its limits.

The only remaining lands are those outside these withdrawal limits, but within the indemnity limits of the Northern Pacific. As to them but a word is necessary. No rights are acquired until selection. *Ryan v. Railroad Co.*, 99 U. S. 382; *Grinnell v. Railroad Co.*,

103 U. S. 739. No prior selection on the part of the Northern Pacific is shown. Its claim that, as the holder of the prior grant, it has a reasonable time in which to make a selection, if good in law, which I doubt, is not sustained by the facts.

A decree will therefore be entered in favor of the Northern Pacific Company as to all lands within its place limits, and also within the limits of the withdrawal of October 12, 1870, and dismissing the supplemental bill of the St. Paul, Minneapolis & Manitoba Railway Company at its costs. The case will be referred to a master to report the lands coming within the limits named.

ST. PAUL, M. & M. R. Co. v. GREENHALGH and others.

SAME v. WENZEL.

(Circuit Court, D. Minnesota. March 3, 1886.)

1. LAND LAWS—ACTS OF CONGRESS OF JUNE 23, 1874, AND APRIL 21, 1876—ACTS MINNESOTA LEGISLATURE, MARCH 1, 1877, AND MARCH 8, 1878—CONSTRUCTION.  
The acts of congress of June 23, 1874, April 21, 1876, and the acts of the legislature of Minnesota of March 1, 1877, and March 8, 1878, all were passed after the time given for the completion of the railroad, when there had been a non-performance of the conditions of the grant, and when, therefore, there existed the right of absolute and total forfeiture by the grantor,—the United States,—and of resumption and transfer by the state to another beneficiary.
2. SAME—RAILROAD COMPANY—BONA FIDE SETTLERS—PRIORITY.  
Congress and the legislature of Minnesota both intended to give to actual *bona fide* settlers priority over the railroad company.
3. SAME—LAND GRANTS—HOW TO BE CONSIDERED.  
All legislative grants are to be regarded as not merely contracts, but also as laws. As such they are subject to the same rules of interpretation that govern other laws, and a primary rule is that the intent of the legislator is to be sought, and, when found, controls. The technical rules that govern the interpretation of private contracts must always yield to the single inquiry of the intent of one party,—the legislature.
4. SAME—AS TO TITLE, INTENT OF GRANTOR IS TO BE CONSIDERED IN EQUITY.  
There is no equity in striking down a legal title when so to do involves a disregard of the manifest intent of the original owner, grantor of such legal title.

In Equity.

Geo. B. Young, R. B. Galusha, and S. U. Pinney, for complainant.  
J. B. Beals, for defendants.

BREWER, J. These causes are so nearly alike that they may be considered together. The complainant claims to be the equitable owner of certain lands, the legal title to which is in defendants, and filed these bills to enforce such claim. Both tracks lie along the line of the St. Vincent extension of complainant's railway, and north of the indemnity limits of the Northern Pacific road. The definite location of this line was made in 1871, and a map thereof filed with

the secretary of the interior, and approved December 20, 1871. The Greenhalgh land is within ten miles of this line, and the Wenzel tract within six miles. The road was built past the Greenhalgh land in November, 1872, and finished to St. Vincent by November, 1878. After the filing of the map of the definite location, and on February 15, 1872, the secretary of the interior withdrew from sale or other disposal the odd-numbered sections within 20 miles. On June 18, 1872, the secretary directed the vacation of this order of withdrawal, notice of which was received at the local land-office on July 5, 1872. This order of vacation was itself revoked on September 4, 1872. On June 26, 1872, Greenhalgh settled on the land in controversy in his case, subsequently filed and proved up his claim, and received a patent. Wenzel settled on his tract June 2, 1874, and filed his claim September 2, 1874. The various acts of congress upon which complainant's title rests were nearly all quoted in the opinion just filed in the case of *Northern Pacific R. Co. v. St. Paul, M. & M. Ry. Co.*, ante, 551, and I shall simply refer to them here. In the outset defendants challenge the validity of complainant's grant in this upper part of the St. Vincent extension, and upon three grounds: *First*, that this was Indian lands in 1857, and therefore never subject to the grant; *second*, the change authorized by the act of 1871 was not in accord with the legislation of Minnesota; *third*, the line of definite location was not within the scope of that act. Neither is sufficient.

*First.* The Indian title was extinguished by treaty, May 5, 1864. The sixth section of the act of 1857 reads:

"Sec. 6. And be it further enacted, that in case any of the lands on the line of said roads or branches are within any Indian territory, no title to the same shall accrue, nor shall the same be entered upon by the authority of said territory or state until the Indian title to the same shall have been extinguished."

Now, in the *Lawrence, L. & G. R. R. Case*, 92 U. S. 743, the question was whether words of general grant would operate on lands in an Indian reservation created by treaty stipulation, and the court say: "The grant is silent as to such a purpose, but if it was to take effect in the Osage country, on the surrender of the Indian title, it would have so declared." This act contained the provision suggested. Under this rule, section 6 opened these lands to this grant when the Indian title ceased, which was before the definite location. The act of 1865, which restored the grant, was passed after the Indian title had been extinguished, and operated as a new grant, unobstructed by any prior Indian title.

*Second.* The case of *Nash v. Sullivan*, 29 Minn. 206, S. C. 12 N. W. Rep. 698, is conclusive as to the harmony between the act of congress and the state legislation. It matters not that that decision was made to uphold a patent title. The *ratio decidendi* affirms the accord, and governs all cases. The action of the state, as well as of the general government, is an equal affirmation.

*Third.* Any question that might otherwise exist as to the line of definite location being within the scope of the congressional grant is put at rest by the act of congress of March 3, 1873, which declares "that the time for the completion \* \* \* of the road from St. Cloud to St. Vincent, in said state, as now located, with the approval of the secretary of the interior, be extended for the period of nine months." I have no doubt of the validity of the complainant's title in this portion of its grant.

Thus far the way is clear; but, after all, the question in these cases arises under the acts of congress of June 22, 1874, and April 21, 1876, and of the state of March 1, 1877, and March 9, 1878. It is claimed generally that prior to any final vesting of title in the complainant to these lands, and while the full control and disposal of them remained with congress, that body exempted them from the operation of complainant's grant, and that the state took similar action. Before examining the acts referred to, let us see when, under what circumstances, and to what extent, but for them, and for the settlement of defendants, the title to these lands would have passed to complainant. The complainant took nothing by the withdrawal. A withdrawal passes no title. It only prevents other titles from accruing. A definite location of the road identifies the tracts within the place-limits, and a title thereto passes, by relation, as of the date of the grant, subject to the defeasance upon failure to perform the conditions of the grant within the time limited. The title to indemnity lands passes only upon selection. Wenzel's land was within the place-limits; Greenhalgh's not. For since the decision in *St. Paul R. Co. v. Winona R. Co.*, 112 U. S. 720, S. C. 5 Sup. Ct. Rep. 334, and *Winona R. Co. v. Barney*, 113 U. S. 618, S. C. 5 Sup. Ct. Rep. 606, it must be considered as settled that the grant of lands in place was limited to six sections, and that the additional four sections were simply a grant by quantity. The selection of the Greenhalgh land was made by the company on March 13, 1880, long after the several acts referred to, and long after Greenhalgh's entry. Until that time the company had no pretense of title, and all that it can claim is that, under the existing laws and withdrawal, no one else could acquire any interest therein prior thereto. As to Wenzel's tract, the definite location operated to transfer, as of the date of the grant, the title to the company, subject to forfeiture on failure to build the road within the time limited. After such failure the grantor had power to forfeit the grant and retake the land. Having power to forfeit the entire grant absolutely, it had the lesser and included power of forfeiting a part and conditionally. The act of June 22, 1874, by its first section, extends the time for the completion of this road to March 3, 1876, and "no longer, upon the following conditions: That all rights of actual settlers, and their grantees, who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise

have legal rights in any of such lands, shall be saved and secured to such settlers or other persons in all respects the same as if said lands had never been granted to aid in the construction of said lines of railroad." The second section requires acceptance by the company as a condition of receiving the benefits of the act. No acceptance was ever made. The first and third sections of the act of April 21, 1871, read as follows:

"Section 1. All pre-emption entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which said lands are situated, or after their restoration to market by order of the general land-office, and where the pre-emption laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties thereto."

"Sec. 3. All such pre-emption entries which may have been made by permission of the land department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws, and the making of the proof required shall entitle the holder of such a claim to a patent therefor." U. S. St. §§ 206-208.

Section 10 of the state act of March 1, 1877, provides that the complainant "shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land \* \* \* upon which any person or persons have in good faith settled, and made or acquired valuable improvements thereon on or before the passage of this act;" "that the governor shall deed and relinquish such lands to such settlers;" and also that "upon the acceptance of the provisions of this act by said company, it shall be deemed by the governor of this state as a relinquishment by said company of all such lands so occupied by such actual settlers." No acceptance, as above provided for, was ever made by the company. Section 3 of the act of March 9, 1878, which is an act amendatory of the act of 1877, contains a proviso that "nothing shall be construed under this act which will waive the right of the state to receive the full grant of ten sections per mile of completed road from the United States;" and also that, upon the completion of a certain named portion of the line, "the governor of the state may convey or certify to said company all the rest, residue, and remainder of the lands granted by the United States to the state of Minnesota to aid in the construction of said line of railroad."

I believe this brings all the material facts before us for consideration. With reference to the act of June, 1874, it may be regarded, on the one hand, as merely a proposition calling for acceptance, and no acceptance being given, wholly without force; on the other hand, as a declaration of the owner of the land of the conditions upon which alone the proffered grant, then subject to forfeiture, would be

continued in force,—in fact a legislative declaration of forfeiture of an existing but unearned grant, coupled with a tender of a new grant upon certain conditions, the acceptance provided for being only the ordinary anticipatory declaration of an intent to comply with the conditions upon which the grant was made, the formality of which is waived by an actual compliance with the conditions. So the act of March, 1877, may be subject to the like criticism of being simply an offer without acceptance, and to the further criticism of an implied repeal by the act of March, 1878, which affirms the right of the state to the entire grant from the United States, and authorizes its conveyance to the company upon the completion of a specified portion of the road.

On the other hand, it may be said that the act of 1877, in direct and explicit terms, as was within the power of the legislature to do, takes from the company every tract occupied by *bona fide* settlers; that the purpose of the acceptance was only information to the governor, and to guide his official action, and in no manner limited the legislative transfer to *bona fide* settlers of all rights and interests in these tracts under the grant from the United States; that the act of 1878, being in terms only an amendment of that of 1877, and containing no express repeal of said section 10, is to be construed in harmony therewith, and means simply to authorize a transfer to the company of all lands within the grant not otherwise disposed of by the provisions of the act.

With reference to the act of April, 1876, it may be urged that the term "entry" means the filing of the claim with the land-office, and not the mere settlement on the land; that Greenhalgh's entry was not made during the revocation of the withdrawal; that his settlement, though after the order of revocation, was prior to the receipt of that order at the land-office, and therefore prior to the actual restoration to market; that while Wenzel's settlement was made after the expiration of the time limited for the building of the road, yet his entry was not until after the act of June 22, 1874, extending the time, and thus while the grant was in full force. Further, that the words "such pre-emption entries" in section 3 refer to entries of the kind named in sections 1 and 2, and mean only entries prior to the receipt at the local land-offices of the notices of withdrawal, or after the restoration to market, and therefore do not cover a settlement or entry like his; and finally that, under the decision in *Schulenberg v. Harriman*, 21 Wall. 62,—a decision prior by some three years to the act of 1876,—a grant does not expire by the mere non-performance of a condition subsequent, but only upon some legal forfeiture, and hence that said third section has no application to the present case. On the other hand, it may be said that the term "entry," in its general use, signifies a settlement with a view to purchase or homesteading; that, at any rate, it relates back to the time of such settlement, and has force from that date, and obviously is used here to cover and pro-

fect rights originating from the settlement; that both withdrawals and vacations thereof date and have operative force from the time they are ordered at Washington, and not from the time notices thereof are received at the local land-offices; that if Wenzel's entry was not technically until after the act of June 22, 1874, extending the grant, it was protected by the very terms of that extension; that the words "such pre-emption entries," though referring back, only mean pre-emption entries in good faith by actual settlers, and do not include all the circumstances attending such entries as are named in the prior sections; and that the expression "expiration of grant" must refer to the time limited in the original granting act for the performance of the condition, for if it referred to the actual forfeiture it would be meaningless, as then the land would be covered by the general acts for disposal of public lands.

I have thus endeavored to outline the principal suggestions on both sides in reference to the force and effect of these several statutes. I propose no further comment on them separately, but state some propositions based upon them collectively.

*First.* All were passed after the time given for the completion of the road, when there had been a non-performance of the conditions of the grant, and when, therefore, there existed the right of absolute and total forfeiture by the grantor, the United States, and of resumption and transfer by the state to another beneficiary.

*Second.* Nothing can be plainer than that both congress and the state legislature intended to give to actual *bona fide* settlers priority to the railroad company. Such intent breathes in every statute and permeates every section.

*Third.* All legislative land grants are to be regarded, not merely as contracts, but also as laws. As such, they are subject to the same rules of interpretation that govern other laws, and a primary rule is that the intent of the legislator is to be sought, and, when ascertained, controls. The technical rules which govern the interpretation of private contracts must always yield to the single inquiry of the intent of the one party,—the legislature.

*Fourth.* The legal title is in the defendants. Complainant rests upon its alleged equitable rights. There is no equity in striking down a legal title when so to do involves a disregard of the manifest intent of the original owner, grantor of such legal title.

Decrees will be entered in favor of the defendants, dismissing the bills, at cost of complainant.



## ST. PAUL, M. &amp; M. RY. CO. v. PHELPS.

*(Circuit Court, D. Minnesota. March 3, 1886.)*

## LAND GRANTS—LAND OUTSIDE OF STATE TO WHICH IT IS GRANTED.

Can land not within the limits of the state of Minnesota be, consistently with the policy of the United States government, held under a land grant, for the purpose of railroad construction, made to the territory of Minnesota under the act of March 3, 1857, *quære*.

In Equity.

*Geo. B. Young and R. B. Galusha*, for complainant.

*W. P. Clough*, for defendant.

BREWER, J. The controversy in this case arises under the act of March 3, 1857, granting lands to the territory of Minnesota to aid in the construction of certain railroads. That portion of the grant which is material reads as follows:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that there be, and is hereby, granted to the territory of Minnesota, for the purpose of aiding in the construction of railroads from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of the Sioux Wood river, with a branch via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North at such point as the legislature of said territory may determine; from St. Paul and from St. Anthony via Minneapolis to a convenient point of junction west of the Mississippi, to the southern boundary of the territory in the direction of the mouth of the Big Sioux river, with a branch via Faribault to the north line of the state of Iowa, west of range sixteen; from Winona via St. Peter to a point on the Big Sioux river, south of the forty-fifth parallel of north latitude; also from La Crescent via Target Lake, up the valley of Root river, to a point of junction with the last-mentioned road, east of range seventeen,—every alternate section of land designated by odd numbers, from six sections in width on each side of each of said roads and branches."

The western terminus of the first main line above provided for was by the legislature of Minnesota fixed at Breckenridge, and the road was completed to that place. The land in controversy lies within six miles of this road, and it is conceded that if it is within the foregoing grant the title of complainant is good. Indeed, the concessions of counsel eliminate all questions but two.

*First*, it is claimed that because the land is situated outside the state of Minnesota it is not within the grant. The facts are these: At the time of this grant, March 3, 1857, Minnesota was yet a territory, its western boundary being the Missouri river. On February 26, 1857, about a week prior thereto, congress had passed an enabling act. 11 St. at Large, 166. By this enabling act the western boundary of the proposed new state of Minnesota was designated as follows:

"Beginning at the point in the center of the main channel of the Red River of the North, where the boundary line between the United States and the British possessions crosses the same; thence up the main channel of said river to that of the Bois des Sioux river; thence up the main channel of said river

to Lake Traverse; then cep the center of said lake to the southern extremity thereof; thence in a direct line to the head of Big Stone lake; thence through its center to its outlet; thence, by a due south line, to the north line of the state of Iowa."

Under this enabling act the state was organized and admitted into the Union the succeeding year. Breckenridge, the place named as the terminus, is situated at the junction of the Bois des Sioux and Red rivers, and on the western boundary of the state. The land in controversy is west of the Bois des Sioux river, and in the present territory of Dakota. Now, that tried by its letter the grant would include lands west of the Bois des Sioux river and in Dakota is obvious, and that congress has the power to grant to a state lands in another state or territory to aid in the construction of a road wholly within its limits is conceded. But the contention is that "it has been the uniform and settled policy of the government to confine land grants, made in aid of the construction of railroads lying wholly within a given state or territory, to lands lying within the same state or territory;" that congress must be presumed to have legislated in conformity with that policy; and having before it the strong probability, almost certainty, that Minnesota would become a state under the provisions of the enabling act just passed, fixed the western terminus of this road at the western boundary of the proposed state, and thereby limited the grant to such boundary.

Counsel for complainant deny that the cases cited warrant the conclusion as to the settled policy of the government, or that there has been any such settled policy; deny that congress fixed the terminus at the western boundary of the proposed state; and rest upon the letter of the grant. The first case cited is on the construction given to the act of September 20, 1850, (9 St. at Large, 466,) granting lands to the state of Illinois to aid in the construction of what is now known as the Illinois Central Railroad.

The seventh section reads as follows:

"And be it further enacted that, in order to aid in the continuation of said Central Railroad from the mouth of the Ohio river to the city of Mobile, all the rights, privileges, and liabilities hereinbefore conferred on the state of Illinois shall be granted to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio river; and that the public lands of the United States, to the same extent in proportion to the length of the road, on the same terms, limitations, and restrictions in every respect, shall be, and is hereby, granted to said states of Alabama and Mississippi, respectively."

A claim of the states of Alabama and Mississippi to a grant proportioned to the entire length of the line from Mobile to the Ohio river was denied, the opinion of the attorney general thus stating the rule:

"The whole length of the railroad through and within the state of Alabama, when actually surveyed and definitely located within that state, under the direction of the legislature thereof, must determine and limit and define the

extent of the grant to that state; and so likewise the whole extent of the railroad within the state of Mississippi, as surveyed and definitely fixed under the direction of the legislature thereof, must determine, limit and define the extent of the grant to that state."

A similar expression of opinion came from the attorney general construing the act of May 17, 1856, entitled "An act granting public lands in alternate sections to the states of Florida and Alabama, to aid in the construction of certain railroads in said states." 11 St. at Large, 15.

On November 24, 1871, in denying an application of the land commissioner of the St. Paul & Pacific Railroad Company for a survey and extension of its grant to these lands west of the Bois des Sioux river, the commissioner of the general land-office ruled that the grant was confined to the limits of the state.

Now, while the prior cases cited may not be strictly in point, yet I think in them is found the rule of the limitation of congressional grants to state lines. While I am not sufficiently familiar with the history of the land department to affirm it as a fact, yet, in view of these rulings, of the confident assertion of counsel, and as no single opposing ruling or action is shown, I think it not improper to assume that the uniform ruling and construction has been as stated. Indeed, when I recall the discussions and controversies which arose in the early history of this nation in respect to claims by certain states—Connecticut, New York, and Virginia—to the ownership of large bodies of lands beyond their territorial limits I do not wonder at such ruling. This very act of 1857 presents other cases in which the very question existed, and the construction given by the department could easily have been shown. I think it obvious that congress had in view the probable organization of Minnesota as a state under the enabling act just passed. It speaks of the future state of Minnesota as though the admission of a state with that name was to be soon expected; and while it may be true that a direct line between the foot of Big Stone lake and the mouth of the Sioux Wood river may cross the state line in two or more places, yet the mention of those places very forcibly suggests that congress was intending thereby to locate the western terminus on the western boundary of the proposed state. If so, was it not legislating in reference to the proposed state, and should its grant not be limited by the ordinary rule? I am aware that in this act provision was made for a road running beyond the western boundary of the proposed state and into the present territory of Dakota, with a grant of adjacent lands, which could be satisfied only by lands in Dakota, and which was in fact so satisfied. But the fact that congress provided for a road outside of the state limits does not make against the claim that it intended only the ordinary provision for a road wholly within the state. I confess that the line of reasoning above pursued is not altogether satisfactory. It seems counter to the plain letter of the statute. But the ruling of the department was

made in 1871. This bill was filed on April 29, 1884. For 13 years the action of the department has been unchallenged. Interests may have grown up on the faith of it. Indeed, counsel for defendant says that a large and flourishing village, Wahpeton, has been built upon lands whose title is similar. There are some plausible, if not convincing, reasons in favor of the ruling of the department. I am reluctant to reverse such ruling or jeopardize the rights based upon it. I think my duty compels me to sustain it until advised otherwise by the ultimate tribunal,—the supreme court; so, without considering the other question, the bill will be dismissed at complainant's costs.

---

**SPRAGUE-BRIMMER MANUF'G Co. and others v. M. J. MURPHY FURNISHING GOODS Co. and others.<sup>1</sup>**

*(Circuit Court, E. D. Missouri. February 23, 1886.)*

**1. CORPORATIONS—LIABILITY OF OFFICERS UNDER SECTION 744, REV. ST. MO.—DISSOLUTION—INSOLVENCY.**

Hopeless insolvency works the dissolution of a corporation, and under section 744, Rev. St. Mo., the president and directors of a corporation dissolved by insolvency are trustees of the corporation, and jointly and severally responsible for the misappropriation of assets.

**2. SAME—FRAUDULENT CONFESSION OF JUDGMENT.**

Where corporate notes are indorsed by the president and directors of a corporation, and, after the corporation is dissolved by insolvency, they confess judgment in favor of the holders of such notes for the purpose of saving themselves from liability as indorsers, and the property of the corporation is levied upon and sold to satisfy such judgments, it amounts to a misapplication of assets.

**3. SAME.**

In such cases the judgment creditor cannot be compelled to refund the money received, whether he is or is not a stockholder, and whether ignorant of the insolvency of the corporation or not.

**In Equity. Creditors' bill. Demurrers to bill.**

This is a suit brought by certain creditors of the M. J. Murphy Furnishing Goods Company against said company and Jesse Arnot, Alfred Bradford, George H. Gill, the Continental Bank of St. Louis, the Importers' & Traders' National Bank, and the Fifth Avenue Bank of New York. The allegations of the bill, so far as they need be here stated, are substantially as follows, viz.:

That M. J. Murphy is the president and Jesse Arnot a director of, and George H. Gill a stockholder in, the M. J. Murphy Furnishing Goods Company; that Alfred Bradford is in fact the owner of a large amount of the capital stock of said company, and for many years was a director, and during the time he was a director commenced indorsing notes for the corporation for discount in the Continental Bank; that about March 1, 1885, he transferred his stock to his wife, and ceased to be a director, for the purpose of enabling himself to secure

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

a preference out of the assets of said company in the event of its final failure, which was then anticipated; that the notes upon which he was then liable as indorser were renewed from time to time until the notes were given, upon which judgment was afterwards confessed in favor of the Continental Bank; that Bradford is a son-in-law of Arnot, and exercised the same control over the corporation after the transfer of his stock as before, and that the transfer was only colorable; that Murphy, Arnot, and Bradford, after the hopeless insolvency of the corporation became manifest, confederated together to dispose of the assets of the company, so as to pay in full the notes indorsed by them, and leave the general creditors totally without payment; that in pursuance of this scheme judgments were confessed by the corporation in favor of the Continental Bank, Fifth Avenue Bank, and George H. Gill, holders of corporate paper indorsed as aforesaid, and the property of the corporation was levied upon and sold, and the proceeds applied to the satisfaction of such judgments; and that at the time judgment was so confessed in favor of said Gill he was aware of the company's insolvency.

The bill prays that the corporation be declared to have been insolvent before said judgments were confessed; that the funds and assets in the hands of defendants are true funds for the benefit of all the creditors; that Murphy and Arnot be removed from their position; and that all the defendants hereto be ordered and directed to turn over all assets of said corporation in their hands, including all funds received by them from the sale of said corporate property, to such trustees as the court may appoint to administer the trust. All the defendants except Mr. Murphy demur.

Section 744 of the Revised Statutes of Missouri is as follows:

"Upon the dissolution of any corporation, already created, or which may hereafter be created by the laws of this state, the president and directors or managers of said corporation, at the time of its dissolution, by whatever name they may be known in law, shall be trustees of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them; to sue for and recover such debts and property, by the name of the trustees of such corporation, describing it by its corporate name, and may be sued by the same; and such trustees shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands."

*Mills & Flitcraft*, for complainants.

*Dyer, Lee & Ellis*, for the Continental Bank.

*Frank J. Donovan*, for Alfred Bradford.

*Fisher & Rowell*, for Jesse Arnot.

*John G. Chandler*, for George H. Gill.

TREAT, J., (*orally*.) Certain propositions have been argued in this case on demurrers as to the respective obligations of parties under the circumstances set forth in the bill, to-wit: The M. J. Murphy Furnishing Goods Company is one of those corporations tolerated by the laws of Missouri, whereby a man, in order to escape his obligations as a private individual, incorporates himself by bringing in just a

sufficient number of others to comply numerically with the requirements of the statute, so that if the business is successful all will be well; but if it is unsuccessful, those dealing with the concern may have no remedies against the only real party who is transacting the business. That class of corporations has been characterized by Brothers MILLER, McCRARY, and BREWER very emphatically; but as long as it is the law, every man who deals with such a corporation does so with a full knowledge of the opportunities thereby presented to effect a result which may be thought inequitable.

It appears in the case set forth in the bill that the M. J. Murphy Furnishing Goods Company was such an incorporation. Mr. Murphy's father-in-law was Jesse Arnot, and his brother-in-law, Mr. Bradford. They became indorsers on the corporate paper. Mr. Gill held some of the paper of the company on which Mr. Murphy himself was indorser. Finding that the concern was, as alleged, "hopelessly insolvent," Mr. Murphy, the president of the company, proceeded to the proper court, and confessed judgment in favor of certain banks that held paper on which his father-in-law, brother-in-law, and himself were indorsers, and execution was ordered by him forthwith. The property was sold, and, under the judicial proceedings in the state court, the sheriff was ordered to distribute the proceeds *pro rata*, which he did. Upon that condition of affairs, this bill is filed, by creditors at large, requiring all these banks that held the paper having indorsers thereon, which received *pro tanto* on their claims, to refund the same, and also that the indorsers cause the same to be refunded in order that an equal and *pro rata* distribution may be made.

Now, the first proposition which occurs to the court (but not argued) is this: If an indorser, not being a party to any fraud or fraudulent scheme, being entirely ignorant of it, if there was such, finds the paper on which he is indorser has been paid *pro tanto*, can he be made liable for the fund or any portion thereof so paid? His liability is only contingent. It is the duty of the maker to pay the debt. Suppose, for instance, as in this case, one of the parties, the Continental Bank, was tendered, as part payment on a note of \$10,000, \$6,000, and refused to accept it, what relationship would it occupy to the indorser? Could it refuse to accept that part payment, and hold the indorser for the whole amount? Those matters were not presented.

Taking the allegations of the bill as true, which the court must do on demurrers, it is evident that this is one of those peculiar corporations which, in law, exist under the statutes of the state of Missouri, and the court has to treat it as the supreme court of the state treats it. When the president and directors of a company know that the corporation is hopelessly insolvent, and dispose of the assets not in accordance with the statutes, as trustees, whereby every one could *pro rata* share therein, each director becomes liable—in the language of the statutes, "jointly and severally liable to the parties thereto"—

for misappropriated assets. But how as to those who have taken payment on demands justly due them? This court cannot order those to be refunded, and charge the whole amount back on the indorsers, who are only contingently liable, when the indorsers knew nothing about the transaction. That seems to be the theory of this bill, and it goes further than any case I can discover, and further than the ordinary rules of law permit. These parties who held the paper—this corporation being the maker—have a right to what they have received. They have nothing to do with the alleged fraudulent scheme. But the underlying thought of the bill seems to be that they should refund, and make the indorsers pay the whole of the obligations. It is a novel theory. If I am an indorser on a gentleman's paper, and the maker pays *pro tanto*, any of his schemes of fraud as to others is nothing to me. Suppose he paid it in entirety, whereby I am relieved as indorser. The primary obligation was the maker's obligation, and mine contingent; and I cannot understand how it is that I, as indorser, am held liable, not only for my indorsement, but for the payment by the maker of his obligation.

There are matters disclosed here which might justify comment upon the manner in which the state law permits such corporations to operate, but the law of the state controls. In this case there seems to have been a sort of family arrangement, by which parties should indorse each other, and then at last confess judgment for everything on which they were indorsers, and leave the creditors at large unpaid. It so happens that the president of the company, Mr. Murphy, has filed no demurrer. The condition of the case at this time is such that the bill stands as against him. Jesse Arnot, the father-in-law, was an indorser and at the same time a director, thus falling under the provisions of the statute. He is personally liable for all misappropriated assets. Mr. Bradford, the brother-in-law, was an indorser on some of this paper, and it appears, suggestively, paid the balance due out of his own pocket, but he was not a director. His wife was a stockholder. The stock, however, is all gone, of course. Mr. Gill was a stockholder, and Mr. Murphy was indorser on his paper, and it was a contrivance by which Murphy, a son-in-law, might run a concern, and leave the creditors without any means of compensation except from corporate assets. If a man is guilty of the folly of dealing with such a concern he must take the consequences.

The opinion of the court is simply this. The demurrer interposed by Mr. Gill, who held some of this paper indorsed by Murphy, is sustained. He is not bound to refund, as he knew nothing about any fraudulent device, but simply received about 60 per cent. of what was due him. Obviously, he is remitted to Murphy, as indorser, for the balance, who appears from the allegations here to be utterly insolvent, and that is Mr. Gill's loss. Mr. Bradford is an unfortunate indorser. About 60 per cent. was paid on his claim, and he has paid the balance. The Continental Bank held some of this paper, and re-

ceived only 60 per cent. *pro tanto*, and Mr. Bradford paid the other 40. Those three demurrers are sustained, viz., the demurrers of Gill, the Continental Bank, and Bradford. The demurrer of Jesse Arnot, the only one remaining, is overruled, because, under the corporate law of this state, as he chose to lend himself to this sort of arrangement, he has to take his liabilities, under the law, for a misappropriation of assets.

The supreme court of this state, and of a great many other states whose decisions I have examined, have reached this conclusion: that where like statutes prevail concerning dissolved corporations, the insolvency of the concern, known to the president and directors, works a practical dissolution, and they must take the statutory consequences, and that is the only safety there is in regard to this peculiar class of corporations under the Missouri law.

---

### O'ROURKE v. CENTRAL CITY SOAP CO.

(Circuit Court, E. D. Michigan. December 7, 1885.)

1. **TRADE-MARK—"ANTI-WASHBOARD" SOAP.**

The words "anti-washboard," as applied to a manufacture of soap, are suggestive rather than descriptive, and may be lawfully claimed as a trade-mark.

2. **SAME—APPROPRIATING MARK—TITLE—ABANDONMENT.**

A person cannot appropriate a trade-mark belonging to another, without his consent, and afterwards acquire a good title by the abandonment thereof by the first proprietor.

3. **SAME—DEFECT OF TITLE.**

A third person may take advantage of this defect of title.

**In Equity.** On pleadings and proofs.

This was a bill in equity for the infringement of a trade-mark claimed by the plaintiff, in the use of the words "anti-washboard," as applied to a manufacture of soap.

The facts of the case were substantially as follows: In 1872 one Thornton R. Walker took out a patent for a composition of matter said to constitute soap, but which did not designate the compound by any name except an "improved soap." About that time, Walker and his partners, doing business under the name of "Anti-washboard Soap Company," at Cary, Ohio, made and sold a soap which they called "Anti-washboard Soap," and which was described as possessing such qualities as would make rubbing unnecessary in the process of washing clothes. Whether it was made according to the formula patented by Walker did not appear. This firm ceased business about 1874, and in that year sold its kettles and apparatus to Clark & Benefiel, of Mattoon, Illinois, by whom soap was made and sold under the same name at Mattoon until August, 1875, when the business was sold by them to one Stephens, who, after carrying it on for three or



four months, died. With his death, the business, and the use of the name "Anti-washboard" by any one succeeding to the business, of the Anti-washboard Soap Company ceased. One of the members of the original firm doing business at Cary had in the mean time moved to Kansas, and on May 12, 1884, after this suit was begun, executed to the defendant an assignment of the right to use the words "Anti-washboard" as a trade-mark. This was the only right claimed by the defendant to the use of these words. The defendant was shown to be a manufacturer of soap in large quantities at Jackson, in this state, with the words "Anti-washboard" impressed upon the bar and wrapper.

The soap manufactured by the Anti-washboard Soap Company, at Cary, Ohio, was sold extensively throughout the country, and in January, 1875, one Winger, who it was shown had seen this soap, and knew of the trade-mark, began the manufacture of a soap at Sturgis, in this state, under the name of "Winger's Anti-washboard Soap." He claimed, however, to have been informed that the business of the Anti-washboard Soap Company had been discontinued. This was about the time that the Anti-washboard Soap Company had sold out to Clark & Benefiel, of Mattoon, and about a year before their business was discontinued, and the trade-mark abandoned by them. Winger carried on business at Sturgis in a very small way from 1874 to September, 1883, when he deposited his trade-mark, "Winger's Anti-washboard Soap," for registration in the patent-office, and it was duly registered October 23, 1883. A few days thereafter he assigned to the plaintiff the "exclusive right to use, in the manufacture and sale of soap," this trade-mark. He also turned over to them his receipt for making soap, but no part or interest in his business. His kettles, staves, cutting boxes, and other apparatus used in making soap he removed to Kansas, where he took up his residence. Soon thereafter the plaintiff began an extensive manufacture of soap at Fort Wayne, Indiana, under the name of the "Summit City Soap Company," using the Winger trade-mark, and in 1885 began this suit for an injunction and an accounting. The defendant began the use of this trade-mark in July, 1880, but Winger was not informed of it until March, 1881.

*R. S. Taylor*, for plaintiffs.

*R. Mason*, for defendants.

BROWN, J. Two prominent objections are made in this case to the monopoly by the plaintiff of the words "anti-washboard" as applied to soap: *First*, that the words are descriptive of the quality of the article, and hence cannot be made the subject of a trade-mark; and, *second*, that they are not original with the plaintiff, but were unlawfully appropriated by him.

1. As a general rule, there is no doubt that, in order that mere words may be upheld as a trade-mark, they must be purely arbitrary,

or must indicate the origin or ownership of the article or fabric to which they are affixed. Words expressive of the character or composition of an article, or of the name by which it is generally known in the market, cannot be made the subject of monopoly. *Burton v. Stratton*, 12 Fed. Rep. 696, 700, and cases cited. There is, however, a class of words which, though not descriptive of the article, are suggestive of some supposed advantage to be derived from using it, or some effect produced by its use. These have been ordinarily, though not always, upheld as valid trade-marks. Examples of such as have been sustained are "Painkiller," as applied to a medical compound, (*Davis v. Kendall*, 2 R. I. 566; S. C., Cox, Trade-mark Cas. 103;) "Invigorator," as applied to a bed-bottom, (*Ex parte Heyman*, 18 O. G. 922;) "Samson Brace," as applied to suspenders; "Blood-searcher" and "Annihilator," as applied to medicines, (*Fulton v. Sellers*, 4 Brewst. 42;) "Zero," to a water-cooler; "Arctic," to a soda fountain; "Day-light," "Sun-light," and "Gas-light," to illuminating oils, (Browne, Trade-marks, § 273.)

The words "Anti-washboard" are not objectionable, as indicating the composition or quality of the article, although the natural inference from them is that by the use of the soap the necessity of rubbing clothes is obviated. Upon the whole, we incline to the opinion that they are rather suggestive than descriptive, and that they may be properly claimed as a trade-mark.

2. The second objection presents a question of somewhat more difficulty. It has been sometimes said that the owner of a valid trade-mark must have been the first to appropriate the name to that particular article, and this, to a certain extent, is true; but if the trade-mark be abandoned, or the use of it intentionally discontinued by the original proprietor, it may be readopted and appropriated by another, provided it has not become a mere description of quality or kind of product. Browne, Trade-marks, § 690, 252; *Durham Smoking Tobacco Case*, 3 Hughes, 151; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217.

In the case under consideration, however, the question is presented whether a person may appropriate a trade-mark belonging to another, and subsequently acquire a good title thereto by the abandonment thereof by the first proprietor. The testimony shows, and it is not disputed, that when Winger began manufacturing soap at Sturgis, under the name of "Winger's Anti-washboard Soap," the firm of Clark & Benefiel was manufacturing soap at Mattoon, Illinois, under the same name, and continued so to do for nearly a year after Winger commenced business. During this time he was an admitted trespasser upon their rights. The fact that he supposed the Ohio firm had gone out of business is no defense if in fact they had an exclusive right to the trade-mark. *Millington v. Fox*, 3 Mylne & C. 338; *Welch v. Knott*, 4 Kay & J. 747; *Leather Cloth Co. Case*, Cox, Trade-mark Cas. 223.

There is no evidence in this case that his competition interfered with the business of Clark & Benefiel, or Stephens, their successor, or that he was the cause of the subsequent abandonment of the business by them, but if it be once conceded that a person may acquire a good title to a trade-mark by appropriation, without the consent of the lawful owner, it would enable a manufacturer, by the use of large capital or superior energy, to drive competitors out of business, by seizing their trade-marks, and using them for that very purpose, provided the lawful owner is unable or unwilling to assert his rights by resort to the courts. We think that no court would hesitate to pronounce against a title so obtained. We find it difficult to distinguish such a case, in principle, from the one under consideration, as it might be impossible to prove that the lawful owner was compelled to discontinue by reason of such competition.

We see no objection to the defendant availing itself of this defense. To maintain their bill for an infringement the plaintiffs are bound to show an exclusive right to the use of this trade-mark. If it appears that the words were in common use to designate the article of manufacture, or if the exclusive right to use them was vested in another, we apprehend that the plaintiffs are no more entitled to an injunction than is the patentee of an invention who fails to show that he is the first and original inventor of the thing patented. *Wolfe v. Goulard*, 18 How. Pr. 64; *Manhattan Medicine Co. v. Wood*, 14 O. G. 519; *Congress & E. S. Co. v. High Rock Co.*, 57 Barb. 526.

In this respect, both stand in the position of a plaintiff in ejectment, who must recover upon the strength of his own title, and not upon the weakness of the defendant's. Indeed, it is a good defense to an ordinary action of replevin that the right to the possession of the property is in a third person. *Dermott v. Wallach*, 1 Black, 96; *Schulenburg v. Harriman*, 21 Wall. 44. The fact that defendant has no better right to the use of the trade-mark than the plaintiff would certainly not entitle the latter to an injunction.

Upon the whole we have come to the conclusion that the plaintiffs never acquired an exclusive right to the use of the words "anti-wash-board," and that their bill should be dismissed.

ATCHISON SAVINGS BANK *v.* TEMPLAR and others.TEMPLAR and another *v.* ATCHISON SAVINGS BANK and others.

(Circuit Court, D. Kansas. February 15, 1886.)

## 1. PARTNERSHIP—DISSOLUTION—APPEARANCE IN SUIT.

The entering of an appearance in a suit by a partner, after a dissolution of the firm and an assignment for the benefit of creditors, will not bind the other partners.<sup>1</sup>

## 2. SAME—JUDGMENT OBTAINED ON SUCH APPEARANCE.

Where a judgment lien on real estate has been obtained under such appearance, the lien may stand, but all proceedings to enforce the same should be stayed until the non-appearing partner can plead to the merits and make any proper defense he may have to the original action.

*L. C. Slavens and James Humphrey*, for T. J. Templar and B. F. Johnston.

*Cook & Gossett and W. W. Guthrie*, for Atchison Savings Bank and others.

FOSTER, J. The main question submitted for decision is presented in both these cases together. The first is a creditor's bill by the Atchison Savings Bank against Templar, Johnston, and others, alleging that the bank obtained a judgment in this court on a cross-bill, in the suit of *Jarboe v. Templar*, against said defendants, in June, 1881, for \$10,525.44, and which is still unpaid, and seeking to subject certain real estate to the payment thereof. In this case Templar and Johnston plead that said judgment is void for want of jurisdiction of the defendants; that no service of summons was made, nor did defendants, or either of them, enter appearance in said proceedings. The other suit is an original bill of Templar and Johnston against Jarboe, the Atchison Savings Bank, and others, seeking by direct proceedings to vacate said judgment for the same reasons before stated.

Said Templar and Johnston were partners under the name and firm of T. J. Templar & Co., engaged in building an elevator, and in the grain business, in Atchison. Said firm became largely indebted to different parties, and D. M. Jarboe & Co. and others took legal proceedings to collect their debts, and enforce their liens on the elevator property. Messrs. Mills & Wells, attorneys of this court, entered a voluntary appearance for Templar & Co. to the original writ of Jarboe & Co., and also to the cross-bill of the savings bank. This appearance was entered for the firm at the instance and by the authority of B. F. Johnston, one of the partners. Those proceedings resulted in various judgments against Templar & Co., and among them the judgment of said savings bank.

So far as Johnston is concerned, his plea has no foundation to

<sup>1</sup>See note at end of case.

stand on. He authorized Mills & Wells to enter the appearance, and he is as absolutely bound by the proceedings as if he had been served with summons.

The question whether Templar is personally bound by that appearance is more difficult to determine. The *status* of the partnership at that time—whether dissolved or still in existence—has an important bearing in the case. This partnership agreement was not in writing, and its exact terms and limitations are left quite indefinite by the testimony. It appears to have been made some time in 1879, to construct and operate a grain elevator at Atchison. It seems to have been a partnership at will, and one which either party could terminate at will. Pars. Partn. 402–405. About the thirtieth of May, 1880, T. J. Templar failed in business at Kansas City, and made an assignment of his interest in this concern to Armour Bros., and about the same time Johnston, in view of said failure, transferred the elevator property to R. A. Park, cashier of said savings bank, to whom said firm was largely indebted. It seems this failure and assignment, and transfer of the property, pretty effectually terminated the object for which the partnership was formed. An assignment by one partner to a third person works a dissolution of the firm. Pars. Partn. 400, and cases cited. So in some cases insolvency or bankruptcy of one partner or of the firm works a similar result. Pars. Partn. 469. Both the partners testify that the failure ended the partnership, and, as a matter of fact and legal result, such, in my opinion, was its effect. A partner cannot substitute his assignee or grantee as a partner in his stead.

The entering of the first appearance by Mills & Wells, by authority of Johnston, was about three months subsequent to the failure and transfer, and the appearance to the cross-bill of the bank was some months later, and after all expectations of prosecuting the business for which the firm was created had passed and gone. It appears from the evidence that Templar gave no consent to these appearances in said suits, and he swears he knew nothing of it, or of said judgment, until several years afterwards. I think, so far as he is concerned, the case comes fairly within the rule established by the supreme court in *Hall v. Lanning*, 91 U. S. 160, and he is not bound by the appearance. Indeed, the court in that case question the right of one partner to enter an appearance for his copartner, without special authority, even during continuance of the firm. The case of *Phelps v. Brewer*, 9 Cush. 390, is to the same effect; but a rule established by the supreme court is sufficient, and I do not care to discuss the decisions *pro* and *con* on this question to which my attention has been called by counsel.

Now, under the circumstances, what order should, in equity and good conscience, be made? The judgment in controversy is not of a foreign jurisdiction, but is a judgment of this court. The appearance of the party was entered by an officer of this court under the author-

ity of one of the partners. I assume all parties acted in good faith. Relying on this appearance, the bank made no effort to make service of summons, although Templar was frequently within the jurisdiction of the court. On this judgment the bank has made a levy, and obtained a contingent lien on real estate, and seeks to subject it to the judgment. The defendant has not set out his defense, and on a hearing his defense may entirely fail. There are precedents to justify the court in refusing to extinguish this lien, but to order a suspension of proceedings on the judgment until the defendant Templar can plead to the merits, and prove any just defense he may have to the original action. Such proceedings are recognized in *Hall v. Lanning*, *supra*, p. 167; also *Denton v. Noyes*, 6 Johns. 296; *Grazebrook v. McCreddie*, 9 Wend. 437; and such will be the order in these cases.

## NOTE.

After dissolution one partner cannot appear for his copartner in a suit brought against the partners, though upon a firm indebtedness. *Loomis v. Pearson*, Harp. (S. C.) 470; *Haslet v. Street*, 2 McCord, 311. Neither can he acknowledge service of process so as to bind his copartners. *Duncan v. Tombeckbee Bank*, 4 Port. (Ala.) 184; *Demott v. Swaim*, 5 Stew. & P. 293. Even before dissolution, one partner cannot confess judgment, or submit to arbitration, so as to bind his copartners. *Stead v. Salt*, 3 Bing. 101; *Adams v. Bankart*, 1 Cromp. M. & R. 681; *Karthaus v. Ferrer*, 1 Pet. 222; *Story*, Partn. § 114; *Pars. Partn.* 179, note; *Colly, Partn.* §§ 469, 470; *Freem. Judgm.* § 232; 1 Amer. Lead. Cas. (6th Ed.) 556.

It was said by the supreme court of Pennsylvania recently that a confession of judgment by a former partner against a firm, while good as against the partner confessing it, will not bind property assigned by the firm to a remaining partner under terms of agreement to pay firm debts. *Mair v. Beck*, 2 Atl. Rep. 218.

CONNECTICUT MUT. LIFE INS. CO. v. BEAR and others.<sup>1</sup>

(Circuit Court, E. D. North Carolina. February 4, 1886.)

## 1. LIFE INSURANCE—EQUITY—CANCELLATION.

A court of equity will not set aside a contract for life insurance during the life of the assured, on the ground that it has been rendered void by something not appearing on the face of the policy, and which can be proved by extrinsic evidence.

## 2. SAME—DISCRETION.

As the assured, who is now intemperate, may reform, and live out the ordinary expectation of life, this is not a case for the ordinary exercise of the discretionary power of a court of equity to order a cancellation, even if such power here existed.

In Equity.

*Reade, Busbee & Busbee*, for complainants.

*Russell & Ricaud*, for defendants.

SEYMOUR, J. This is a bill for the cancellation of a policy of insurance upon the life of the defendant S. Bear, in favor of the other

<sup>1</sup> Reported by John W. Hinsdale, Esq., of the Raleigh bar.

defendants, and the relief prayed for is put upon two grounds: *First*, an alleged false representation of his habits with respect to the use of spirituous liquors made by him in his application; and, *second*, an impaired condition of health caused by habitual drunkenness since the issuance of the policy.

The evidence does not prove the alleged fraud which constitutes the first cause of action.

Upon the second, it tends to show that the health of the defendant has been seriously impaired by the use of intoxicating drinks; that, if he shall continue in his present course of life, it is not probable that he will live to the age of ordinary expectation; and that, if he reform, nothing that has yet occurred will prevent his attaining to it. There is some evidence tending to show a recent change in his habits.

The contract of insurance contains a condition that, "if the insured shall become so far intemperate as to impair his health," the policy "shall become and be null and void." The court is of the opinion that the insured has become so far intemperate as to impair his health, and the question for determination is whether the plaintiff is entitled to relief in equity. It cannot be granted on the ground of fraud, for that has not been proved. The action must rest, if supported at all, on the jurisdiction of a court of equity to declare and establish a right.

The question is whether, during the life of the assured, a court of equity will set aside a contract of insurance, on the ground that it has been rendered void by something not appearing on the face of the policy, and which can be proved by extrinsic evidence. There are many reasons, which may be, and some of which have been in this case, urged in support of such action. The ordinary course of juries, in suits against insurance companies; the force with them of the argument that a company, having received the premiums during the life of the insured, ought not in justice to refuse payment after his death; the convenience of trying, while the evidence is easily accessible, the issue of the misconduct of the assured,—are inducements which would be very powerful were I passing upon the question as a legislator. As a judge, I am bound by precedent. No case can be cited in which a policy has been set aside during the life of the assured on the ground of a forfeiture occurring after the making of the contract. In *Insurance Co. v. Bailey*, 13 Wall. 616, a doubt is expressed as to whether it could be done in a case of a policy fraudulently obtained. In theory, if not in practice, the legal remedy is complete. The company may avail itself of it when sued. No division of the powers of courts of equity includes such a source of jurisdiction. A bill of peace can be brought only to avoid multiplicity of actions; a bill *quia timet*, except in certain cases under state statutes, only by one in possession of land, to remove a cloud in his title. This action is of the first impression, falling, as I have said, under no recognized title of equity.

There is further objection to it. If the court could grant the relief asked, it would come within its discretionary power. Since, in a case like this, it does not, and in the nature of things cannot, appear that the defendant may not reform, and live out the ordinary expectation of life, it is not, as matter of law, in the opinion of the court, a proper case for the exercise of the discretionary power to order a cancellation, even if such power existed.

---

CRUIKSHANK v. FOURTH NAT. BANK.

(Circuit Court, S. D. New York. February 13, 1886.)

NEW TRIAL—VERDICT NOT SUSTAINED BY EVIDENCE—PROVINCE OF COURT.

The weight of the evidence is for the jury, if there is any to support plaintiff's case; but whether there is any or not is for the court.

At Law.

*W. Hildreth Field*, for plaintiff.

*David Willcox*, for defendant.

WHEELER, J. The plaintiff was in the employ of a mercantile house in New York, at \$6,000 a year. The defendant had \$48,531.07 of commercial paper of western firms, some months overdue and unpaid, in the discharge of which one Thacker was interested. The plaintiff's employers had \$13,544.90 of like paper, and two other banks of the city enough more to make \$90,376.05 in all. The plaintiff was informed by Thacker that he wished to get this paper taken up through a mercantile house, and not through attorneys, and a proposition to pay \$17,000 in cash, and to give \$3,000 in secured notes and unsecured notes for the balance, was left with him. This proposition was taken by the plaintiff to all the others, who agreed to accept it, and then to the officers of the defendant, who refused. They mentioned terms to the plaintiff which they would advise acceptance of, if made. The plaintiff communicated these terms to Thacker, who came, and, in company with plaintiff, had an interview with the defendant's officers on the subject. Afterwards he sent a proposition of 25 per cent. in cash, and the balance in unsecured notes, and the plaintiff took this to defendant's officers. They told him to get another firm, who held \$11,000 of similar paper, to pool their claim, and the proposition would be accepted. He got that firm to do so by paying them \$250, and the proposition was accepted. The amount of the 25 per cent. of the whole was sent by Thacker to the defendant, and placed to his credit. The \$250 paid out by defendant was deducted; the proportion of each was computed; Thacker's checks, payable to the order of the plaintiff, were drawn for the respective shares, except that of defendant, and indorsed by



the plaintiff to each, leaving defendant's share in its hands; and the \$250 was sent to the plaintiff. The plaintiff claimed a commission for his services, which the defendant refused to pay, and this suit was brought. The plaintiff's testimony tended to show that he expected pay of defendant while he was doing what he did do, although he said nothing whatever to the defendant's officers about it. The defendant's testimony tended to show that they did not expect to pay him anything, nor that any pay would be claimed. The jury were instructed, in substance, that if the plaintiff performed any services at the request of the defendant in procuring this settlement, he would be entitled to recover reasonable compensation for such services; and that if he performed services without request, under such circumstances that the officers of the defendant would be given fairly to understand that the services were to be paid for, he would be entitled to recover fair compensation for such services.

The defendant, on this motion for a new trial, does not claim that these instructions were not correct as propositions of law, but does insist that there was no sufficient evidence to bear out a finding that there were any valuable services performed by the plaintiff for the defendant, or that there was anything to give the defendant to understand that the plaintiff was to be paid by the defendant. On carefully reviewing the testimony, it seems to fairly amount to no more than that the plaintiff took the propositions of Thacker to the defendant, to get them accepted if he could. It does not show that he was operating in the interest of the defendant to procure the most that he could from Thacker; but rather that his business with Thacker was to shape the propositions to the lowest terms which the defendant would accept. A letter which the president of the defendant gave to the plaintiff to show that the last proposition was accepted, and which the plaintiff took and acted upon, sets forth somewhat the position of the plaintiff, and how it was understood. It reads:

*"D. Cruikshank, Esq., New York—*DEAR SIR: You are hereby notified that I will accept the offer of settlement for certain notes issued by J. Stevens, Jr., as arranged with you, on the basis of the letters of Mr. Newton Thacker of February 20th and March 14th.

*"Yours, very truly,*

O. D. BALDWIN, Pres."

The plain import of this is that the plaintiff had been acting on one side and Baldwin on the other, and not both on the side of the bank and Thacker on the other, in effecting this arrangement. As the case stood upon this trial, there was nothing fairly tending to show that the plaintiff performed any services for the defendant, either on request or any implied understanding that they were to be paid for, or under circumstances which would give the officers of the defendant to understand that they were being performed for pay. The weight of the evidence was for the jury, if there was any to support the plaintiff's case; but whether there was any or not is for the

court. The verdict does not appear to rest on any substantial evidence.

Motion for new trial granted.

---

BYBEE v. OREGON & C. Ry. Co.

(Circuit Court, D. Oregon. February 19, 1886.)

1. GRANT TO THE OREGON & CALIFORNIA RAILWAY COMPANY BY THE ACT OF 1866.

The grant of lands and the right of way to the Oregon & California Railway Company by the act of July 25, 1866, (14 St. 239,) and the act of June 25, 1868, (15 St. 80,) construed to be (1) a grant of the odd sections of land within 10 miles on each side of the line of the road, not otherwise appropriated or disposed of under the laws of the United States prior to the definite location of said line, on condition that the road is completed by July 1, 1880, for a breach of which condition the grantor alone can claim a forfeiture; (2) the grant of the right of way absolute, to take effect on the definite location of the line of the road from the passage of the act of 1866, as against any person claiming under a settlement of appropriation subsequent to the passage thereof, without condition, save that which the law tacitly annexes to the grant of any such franchise, the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the government for that purpose.

2. SAME.

The declaration in section 8 of the act of 1866, that, in case the road is not completed by the time prescribed, "this act shall be null and void," taken in connection with the context, that the lands not patented to the company at the date of any such failure "shall revert to the United States," and the general purpose of the act, and the policy of congress in passing it, amounts to nothing more than a declaration that the lands are granted on the condition that if the road is not completed in due time, the portion then remaining unpatented or unearned may be reclaimed by the United States.

Action to Recover Damages.

*Edward B. Watson and James F. Watson*, for plaintiff.

*E. C. Bronaugh*, for defendant.

DEADY, J. This action was brought in the circuit court of the state, for Jackson county, to recover damages for an alleged injury to a water ditch. The defendant answered, denying sundry allegations in the complaint, and then set up a title or right of way in itself over the *locus in quo*, under an act of congress, to which defense the plaintiff demurred. Thereupon the cause was removed by the defendant to this court, as one arising under a law of the United States, where the questions arising on the demurrer were argued by counsel. It is alleged in the complaint that the defendant is a corporation duly organized under the laws of Oregon; that on September 3, 1883, the plaintiff was the owner in fee of an undivided half interest in a certain water ditch and right, situated on the south side of Rogue river, in said county, and in the possession thereof as tenant in common with Daniel Fisher, when he and said Fisher, in consideration of

\$250 paid them by the defendant, conveyed to it the right to enter on said ditch, and construct and operate its railway over the same, on condition, however, that it would not impair or obstruct the use or enjoyment of said ditch by said grantors, to which condition the defendant assented, and entered into possession of the premises in pursuance of said deed and subject to said condition; that, notwithstanding, the defendant constructed its road across said ditch in such a manner as to permanently obstruct and destroy the same; and that the defendant has appropriated said ditch to its exclusive use, so as to prevent the flow of water therein where said road crosses the same, to the damage of plaintiff \$7,000. It is stated in the defense in question that the defendant was incorporated to construct and operate a railway and telegraph line from Portland to the southern boundary of the state; that by section 3 of the act of July 25, 1866, (14 St. 240,) entitled "An act granting lands to aid in the construction of a railway and telegraph line from the Central Pacific Railway, in California, to Portland, Oregon," there was granted to the defendant the right of way through the public domain, to the extent of 200 feet in width wherever its road might be located on said lands; that the ditch, at the point alleged to be injured, was located and dug and is situated on the public domain, where, on July 25, 1866, the defendant, by virtue of the grant aforesaid, had the right to locate its road, in doing which, and in constructing and operating the same, it became necessary for the defendant to appropriate 200 feet in width of the land over which said ditch was located, and construct and operate its road thereon, and that any injury which was done to said ditch was the result of such construction and operation, and not otherwise; that on May 17, 1879, said Fisher attempted to appropriate the land in question to his use under the mining laws of the United States, and thereafter constructed said ditch over said "right-of-way land," which is the only claim said Fisher ever had or made thereto, and the plaintiff claims under said Fisher, and never had or made any other claim to the premises than the one so derived; and that the defendant took nothing by said deed from the plaintiff, for that it then owned, by virtue of said grant, all the right and property pretended to be conveyed thereby. The causes of demurrer assigned to this defense are: (1) It does not state facts sufficient to constitute a defense; (2) the plaintiff is estopped, on the facts stated, from claiming the right of way under said act of July 25, 1866; and (3) the defendant forfeited its right of way under said grant by its failure to complete its road over the same on or before July 1, 1875.

By section 2 of the act of 1866 there was granted to the defendant, to aid in the construction of its road, every alternate section of the public lands, designated by odd numbers, to the amount of 10 such sections per mile, not otherwise disposed of by the United States, with the right to select, from the odd sections within 10 miles of each side of said grant, lands in lieu of any that may be disposed of prior to

the location of the line of said road. And by section 3 there was granted to it the right of way over the public lands, to the extent of 100 feet on each side of the road, where the same may pass over said lands. By sections 6 and 8 of said act it is provided that unless "the whole" of the road is completed before July 1, 1875, the "act shall be null and void, and all the lands not conveyed by patent to said company" at the date of said failure "shall revert to the United States;" but by the act of June 25, 1868, (15 St. 80,) the time for completing the road was extended to July 1, 1880.

It is nowhere directly stated that the road was not completed within the time prescribed by congress, but it is fairly inferable that such is the case from the fact stated in the complaint and not denied in the defense, that on September 3, 1883, the defendant took a deed from the plaintiff giving the former the right to construct and operate its road at a point between the *termini* thereof, across the ditch of the latter. And it is a matter of such common notoriety that the road was not constructed south of Roseburg until after 1880, and it is not yet quite completed to the southern boundary of the state, that the court may well take judicial notice of the fact; and on the argument it was practically admitted.

This act is a present grant, but the particular sections that pass to the company under it cannot be ascertained until the route is definitely located; but, when ascertained, the title attaches from the date of the act. It is also a grant made on a condition subsequent,—that the road shall be completed by a prescribed time,—but no one can take advantage of a breach of this condition but the government,—the grantor,—and in the nature of things it can only do so by judicial proceedings authorized by law, or a legislative resumption of the grant. This well-settled rule of law concerning the operation of a condition subsequent annexed to an estate in lands in fee, and the effect of a breach thereof, has been uniformly applied by the supreme court to the grants of the public lands made by congress in aid of the construction of railways, with the condition annexed that they should be completed within a specified time. *Railroad v. Smith*, 9 Wall. 97; *Schulenberg v. Harriman*, 21 Wall. 60; *Leavenworth Ry. Co. v. U. S.*, 92 U. S. 740; *Missouri Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 496.

But counsel for the demurrer contend that the language of the act of 1866 is peculiar, and that by operation of section 8 the act becomes "null and void," at once and *in toto*, whenever and as soon as there is a breach of the condition concerning the completion of the road. But the general expression "this act shall be null and void" is qualified by the words immediately following: "And all the lands not conveyed by patent to said company, \* \* \* at the date of any such failure, shall revert to the United States." This shows how far and for what purpose the act would, in such contingency, become "null." Certainly it would not become "null" as to the lands already patented under it, or earned in pursuance of it. In other words, it

is to become "null" only so far as to allow the grantor to resume the grant, on a failure to comply with the condition, and then only as to the lands remaining unpatented or unearned; and but for this qualification the grant might have been wholly resumed or forfeited for any failure to comply with the condition, even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of congress in making the grant.

In the leading case of *Schulenberg v. Harriman, supra*, the act making the grant did not, it is true, declare that the same should become "null and void" on a failure to comply with the condition and complete the road; but it did provide what, in my judgment, is but the legal equivalent, in this respect, of section 8 of the act of 1866, namely: "If said road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States;" and so thereafter the act would cease to have any force or effect, and practically would be "null."

Nor did the failure to complete the road by July 1, 1880, in any view of the matter, cause the act of 1866 to become "null" as to the right of way. The grant of the right of way is a separate and distinct matter from that of the lands to aid in the construction of the road. The reversion or forfeiture provided for in section 8 of the act of 1866 does not include the right of way, but is limited to the "lands" remaining unpatented or unearned at the time of the failure. The grant of the right of way is without condition, except that which the law tacitly annexes to all such easements,—the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the government for that purpose. But it is also a present absolute grant, and takes effect, when the line of the road is located, from the date of the act, as against any intervening claim or settlement whatever. Whoever settled on or appropriated for any purpose, under any law of the United States, any portion of the public lands on the possible line of this road, after July 25, 1866, did so subject to this grant of the right of way to this defendant.

It appears from the defense that the plaintiff never was the owner of the land in question, but that it has been occupied or appropriated by him, and those under whom he claims, since May, 1879, under the act of July 26, 1866 (14 St. 253,) entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes." But this occupation commenced long after the passage of the act granting the right of way over this land to the defendant, and is subordinate thereto; and this is so without reference to the fact that the act, under which the ditch was dug, is one day later in time than the other; for no one can claim any right, under that act, to any particular place or piece of ground prior to his occupation or appropriation of the same thereunder.

The conclusion here reached, in regard to the nature and effect of the grant of the right of way to the defendant, is fully sustained by the supreme court in *Railway Co. v. Alling*, 99 U. S. 474, and *Railway Co. v. Baldwin*, 103 U. S. 428. In the latter of these cases Mr. Justice FIELD suggests the reasons why grants of land in aid of the construction of railways have generally been made subject to the right of appropriation by individuals under the pre-emption and other like laws of the United States between the date of the act making the grant and the fixing of the limits and operation of the grant by the definite location of the line of the road; while those of the mere right of way have been made absolute, and to take effect from the passage of the act, as against any location, claim, or settlement made after the date of the grant and before the definite location of such right. He says:

"The grant of the right of way \* \* \* contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given, but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route."

In the construction of this ditch on the possible line of the defendant's right of way from Portland to the southern boundary of the state, the parties engaged therein took the risk that such line might be located on, along, or across the same, in which case their right, under the ditch and canal act of 1862, must so far yield to the prior and better right of the defendant under the railway act of the same year. *Doran v. Central Pac. Ry. Co.*, 24 Cal. 259. In this case the court say:

"The grant by congress of the right of way over any portion of the public land to which the United States have title, and to which private rights have not been attached, under the laws of congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering in pursuance of his grant, or can recover damages that may necessarily be occasioned by such entry."

But the plaintiff contends that the defendant is estopped, by the acceptance of the deed of September 3, 1883, from asserting its prior title to the premises under the act of 1866 granting it the right of way over the same. It is a well-established rule of law that, ordinarily, a vendee is under no obligation to support his vendor's title, and therefore he is not estopped to deny the same except in a few cases

where his conduct in so doing would be repugnant to his acceptance of the grantor's deed, or a claim made under it. *Society, etc., v. Pawlet*, 4 Pet. 506; *Blight v. Rochester*, 7 Wheat. 547; *Croxall v. Shererd*, 5 Wall. 287; *Merryman v. Bourne*, 9 Wall. 600; *Sparrow v. Kingman*, 1 N. Y. 242; *Coakley v. Perry*, 3 Ohio St. 344; *Stark v. Starr*, 1 Sawy. 24; *Bigelow, Estop.* 294.

This is a peculiar case, and my attention has not been called to one that is its exact parallel. At the date of his deed, the plaintiff's ditch was constructed along and across the premises, but the legal right to the use and possession thereof, for the purpose of its incorporation, was in the defendant. From the date of the definite location of the line of the defendant's road, the plaintiff had no right or easement to or in the land within the defendant's right of way, and was, to all intents and purposes, a naked trespasser thereon. He therefore had nothing to sell or convey to the defendant. His possession, if any, was merely constructive. Under these circumstances, the parties apparently supposing that the plaintiff had acquired some right to flow the water over the premises, the defendant purchased the privilege of constructing and operating its road across and along the ditch for \$250, and on the further condition that it would not thereby obstruct or impair the same. But this condition or covenant being incident to and dependent on the conveyance of some right in the premises to the defendant, if the latter is at liberty to show that nothing passed by such conveyance, the condition or covenant is left without consideration or support and falls to the ground. But if there is any good reason in law or justice, notwithstanding the want of title in the plaintiff, that the defendant should keep this condition or covenant, it will be estopped to show a want of consideration from the plaintiff. But the plaintiff has really parted with nothing, nor has the defendant obtained anything from him, although it has paid the plaintiff \$250. The ditch was dug on what turned out to be the defendant's right-of-way land, and the plaintiff, in consenting to allow it to construct and operate its road thereon, surrendered nothing to which it had any legal right. The conveyance was altogether an idle and superfluous act, and whatever misapprehension of the parties, as to their rights in the premises, may have induced it, in legal effect it is a mere nullity.

The case of *Holden v. Andrews*, 38 Cal. 119, is somewhat analogous. Holden, being in possession of a tract of the public land, sold or abandoned the same to Andrews for a specified sum, to be paid in the future. Andrews failed to pay, and Holden brought an action to recover the possession of the land, in which he had judgment. On the trial the defendant offered to prove that since the sale he had acquired the title from the United States under the homestead law, which was not allowed, on the ground that he was estopped from setting up the after-acquired title from the United States without first surrendering the possession obtained by his purchase from the plain-

tiff. On appeal the judgment was reversed and a new trial ordered. The opinion of the court was delivered by Mr. Justice SAWYER, who said: "We think this is not a case that falls within the rule. The plaintiff did not pretend to have any other title than by naked possession."

In *Coakley v. Perry*, *supra*, the court says:

"The decisions in this country, in which the grantee and those claiming under him were held to be estopped to deny the title of the grantor, were cases in which the grantee received and held possession under the conveyance, and relied upon it as his source of title, and not where the grantee held the title under a prior and independent conveyance."

Here the defendant derived nothing from the plaintiff, and does not rely on his conveyance as a source of title, but does rely on a title derived from the United States prior to such conveyance. On the whole, my judgment is that this case is not an exception to the rule which allows a vendee to deny his grantor's title, and from the facts stated in this defense it clearly appears that the defendant took nothing by the conveyance from the plaintiff, and is therefore not bound to keep the condition or covenant therein concerning the plaintiff's ditch.

The demurrer must be overruled; and it is so ordered.

---

### TRESCOTT v. CITY OF WATERLOO.<sup>1</sup>

(Circuit Court, N. D. Iowa, E. D. November Term, 1885.)

#### MUNICIPAL CORPORATION—IMPRISONMENT UNDER VOID ORDINANCE—ACTION FOR FALSE IMPRISONMENT.

A party who has been arrested for violation of an unconstitutional municipal ordinance, requiring a license fee to be paid by non-resident peddlers, and, on conviction, has served out his fine in prison, cannot maintain an action against the municipal corporation for false imprisonment.

At Law. Demurrer to petition.

*Blum & Blum*, for plaintiff.

*C. W. Mullan*, for defendant.

SHIRAS, J. The questions submitted to the court are presented by a demurrer to the petition. The plaintiff avers that for the past two years he has been a citizen of the state of Illinois; that the defendant is a municipal corporation, created under the laws of the state of Iowa; that it has legislative authority to license and regulate canvassers and peddlers; and that, in pursuance thereof, in February, 1884, it adopted an ordinance as follows:

#### "PEDDLERS AND HAWKERS.

"Proprietors of dollar stores and gift enterprises, and all persons transiently remaining in the city, selling, or offering for sale, in any manner, any goods.

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.



wares, or merchandise at retail, either in any temporary place of business, or traveling about the city, shall pay such sum as the mayor shall determine in each particular case."

—That said ordinance is unconstitutional and void; that in February, 1884, the plaintiff, while engaged in peddling spectacles from door to door in said city of Waterloo, without having a license therefor, was, by order of the mayor of said city, arrested for so doing, fined, and imprisoned for non-payment of such fine, causing damage to plaintiff, for which judgment is sought in this action. To this petition a demurrer is interposed, on the ground that the facts alleged do not show a cause of action against the city.

In the cases of *Marshalltown v. Blum*, 58 Iowa, 184, S. C. 12 N. W. Rep. 266, and *Town of Pacific Junction v. Dyer*, 64 Iowa, 38, S. C. 19 N. W. Rep. 862, the supreme court of Iowa held that ordinances discriminating in favor of the residents of the city or town, against residents of other states, or against residents of other sections of Iowa, were void.

Not questioning that the ordinance adopted by the city of Waterloo comes within the ruling thus made, and is therefore void, counsel have discussed the question whether the city can be held liable for damages to the plaintiff under the state of facts alleged in the petition. It will be borne in mind that the plaintiff could, by proper action on his part, have defeated the assessment of a fine against him for selling without a license. If the decision in the police court was adverse to him in this particular, he could, by appeal, have carried the case to a higher court, and thereby have caused the reversal of the judgment assessing a fine against him. Had he paid the fine under protest, he might have recovered the same in a proper action. He did not pursue either of these courses. Having undertaken to peddle goods without a license, and having been arrested for a violation of the ordinance, he suffered a fine to be entered against him, and, rather than appeal or pay the fine in money, he discharged the fine by suffering imprisonment under the provisions of the state statute. He now seeks to recover damages against the city on the ground that the ordinance is void because it discriminates in favor of the residents of the city.

The supreme court of Iowa, in repeated decisions, affirms, as the law of the state, the general rule that the police regulations of a city are not made and enforced in the interests of the city in its corporate capacity, but in the interest of the public, and that consequently the city is not liable for the acts of its officers in enforcing such regulations. *Ogg v. Lansing*, 35 Iowa, 495; *Calwell v. City of Boone*, 51 Iowa, 687; S. C. 2 N. W. Rep. 614. The regulation and control of peddlers, hawkers, proprietors of dollar stores, gift enterprises, and the like, as provided for in the ordinance passed by the city of Waterloo, is a police regulation, within the meaning of the rule laid down in the cases cited.

Again, the action of the city in adopting the ordinance in question was, upon its part, a legislative act, and the exercise of a right of sovereignty primarily belonging to the state, but by the state delegated to the city. For errors of judgment in the exercise of such powers the cities are not liable in their corporate capacity. *Fowle v. Alexandria*, 3 Pet. 398; *Duke v. City of Rome*, 20 Ga. 635; *Ogg v. Lansing*, 35 Iowa, 495.

The demurrer to the petition is therefore sustained.

### WILEY for Use, etc., v. BOROUGH OF TOWANDA.

(Circuit Court, W. D. Pennsylvania. February 17, 1886.)

#### CONTRACT IN BEHALF OF PROPOSED CORPORATION—PRELIMINARY AGREEMENT—SUBSEQUENT ADOPTION OF CONTRACT.

The defendant and W. (who professedly acted in behalf of a corporation to be organized) executed an agreement under seal, providing for the erection, by the proposed corporation, of water-works; the defendant covenanting to pay to such corporation for the use of water a certain sum of money yearly, and it was stipulated that the agreement should inure to the exclusive benefit of the proposed corporation, and should be adopted and executed by it within 30 days from the date of its letters patent, or else the agreement should be void. The contemplated corporation having been created, within the prescribed time adopted the agreement, and formally executed the same under its corporate seal. In an action for subsequent breaches of the defendant's said covenant, brought by W. for the use of the corporation, *held*, that the agreement between the defendant and W. was preliminary, and was superseded by the completed contract between the defendant and the corporation, which ensued upon the adoption and execution of the agreement by the latter, and that the right of action was in the corporation and not in W.

At Law. Action of covenant.

*John F. Sanderson and John N. Califf*, for the demurrer.

*W. B. Rodgers and John S. McCleave*, contra.

ACHESON, J. It is quite true that where the citizenship of the plaintiff gives jurisdiction, and the legal right to sue is in him, the court will not inquire into the citizenship of the party beneficially interested in the claim. The question presented, then, is whether Solon L. Wiley is invested with such legal right. To determine this, resort must be had to the written agreement declared on; and, as the scope thereof is indicated by the opening paragraph, it may be well to quote it at length:

"This agreement made this twenty-eighth day of October, A. D. 1879, between the borough of Towanda, in the county of Bradford, and state of Pennsylvania, party of the first part, in pursuance of a resolution adopted by the town council of said borough on the twentieth day of October, A. D. 1879, and Solon L. Wiley, for and on behalf of the corporation to be organized in pursuance of the act of assembly of Pennsylvania approved the twenty-ninth day of April, 1874, and its supplements, for the supply of water to the public, party of the second part; and this contract shall only inure to the benefit

of such proposed corporation, and shall be adopted by resolution of the proper officers of the said proposed corporation, and be duly executed on its part within thirty days from the date of its letters patent, or else this agreement shall be void."

Here follows the defendant's covenant (for the breach of which this suit is brought) to "*pay to said proposed corporation*," for the use of water to be furnished from 50 fire-hydrants, etc., the yearly sum of \$2,500, etc. The agreement then proceeds in the language following:

"And the said party of the second part hereby covenants and agrees, on *its* part, that *it* will erect and maintain a good and sufficient system of water-works for said borough for protection against fire, and for domestic and other purposes," etc.

In setting forth in detail the various things to be done by the party of the second part, the word "they" is sometimes employed, but manifestly the proposed corporation is meant, and Wiley does not bind himself personally to do or observe anything. Besides being executed by the defendant, the agreement was signed and sealed by Wiley. The plaintiff's declaration, however, recites that "the said Towanda Water-works Company did also, by resolution of its board of directors, and by its proper officers, adopt the said indenture, and did duly execute the same on its part within thirty days from the date of its letters patent," and, upon an inspection of the agreement itself, the formal execution thereof by the Towanda Water-works—by the signatures of its proper officers, and the affixing thereto of its corporate seal—appears as of December 6, 1879.

Such being the admitted facts, how can the present action be maintained? It may be conceded, indeed, that where a covenant is entered into between two parties for the benefit of a third, the action thereon must be brought in the name of the party to whom it is made, and not by him for whose benefit it is made. *Strohecker v. Grant*, 16 Serg. & R. 237. No doubt the general rule is that one not a party to a deed *inter partes* cannot sue upon any contract contained in it. *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. 68; *Dacey*, Parties, 118. But is not the corporation, the Towanda Water-works, a party to the instrument in suit? Has it not adopted the agreement, and set its corporate seal thereto, and this in pursuance of one of its express provisions? Now, a party who adopts a contract made in his behalf, by the ratification is bound by it the same as if he were an original party. Whart. Ag. § 73. Obviously, the intention of the parties to the original agreement here was that, touching the whole subject-matter thereof, the ultimate contract should be between the borough of Towanda on the one side, and on the other side a corporation created with authority to erect the contemplated water-works. Nothing can be plainer. Wiley assumed no personal obligation whatsoever, and he was expressly excluded from any individual benefit. Moreover, it was a fundamental condition of the agreement that if the proposed corporation, within thirty days from the date of its letters patent, did

not adopt and duly execute the contract, the agreement should be void. The true view of the case, then, it seems to me, is this: that the agreement between the borough of Towanda and Wiley was preliminary, and was superseded by the completed contract which ensued upon the adoption and execution of the said agreement by the Towanda Water-works Company. Thereby direct and complete contract relations sprang up between the two corporations. The purpose of Wiley's intervention had thus been fulfilled, and the preliminary agreement (at least in so far as he is concerned) is *functus officio*. *Chesbrough v. New York & E. R. Co.*, 13 How. Pr. 559.

It will be perceived that the defendant's covenant is not to pay to Wiley, but directly to the corporation; and hence the suggestion that the interest of the corporation is equitable, the legal right being in Wiley, is without force. It may be well to add that the breaches of covenant complained of occurred after the corporation had executed the agreement. It is not pretended that there was any prior breach, nor indeed could there have been.

I am of opinion that the sole right of action is in the Towanda Water-works; but, even if Wiley's relation as a party to the instrument in suit would require the use of his name as a plaintiff, still the joinder of the corporation, which is also a party to the indenture, and the real party in interest, as co-plaintiff, would surely be necessary. *Dicey, Parties*, 119.

The demurrer must be sustained.

---

### RICHELIEU & O. NAV. CO. v. BOSTON MARINE INS. CO.

(Circuit Court, E. D. Michigan. January 13, 1886.)

#### 1. MARINE INSURANCE—ACTION ON POLICY—PROTEST AS EVIDENCE.

In an action upon a policy of marine insurance, the protest, a copy of which was served with the proofs of loss, as the basis of the plaintiff's claim for the sum insured, was held admissible on behalf of the defendant.

#### 2. SAME—PROTEST NOT ATTACHED TO PROOFS OF LOSS.

The fact that such protest is not actually attached to the proofs of loss is immaterial, if it is referred to and described therein so that it may be identified.

#### 3. SAME—STATEMENT MADE BY MASTER TO NOTARY.

Statements of the master made at the time the notary was reducing the protest to writing, explanatory of certain words used therein, are admissible as part of the *res geste*.

#### 4. SAME—VESSEL BOUND BY WHAT LAW OF NAVIGATION.

A Canadian steamer, navigating Canadian waters, between two Canadian ports, is bound to comply with the statute of Canada with respect to the navigation of her waters; and an American insurance company, carrying a policy upon such steamer, must be held to have contemplated its requirements.

#### 5. SAME—NEGLIGENCE NOT AMOUNTING TO BARRATRY.

In the absence of an express stipulation in the policy, the underwriter is liable for losses resulting from negligence not amounting to barratry.

## 6. SAME—VIOLATION OF STATUTORY OBLIGATION.

The violation of a statutory obligation, or a proved neglect to conform to the requirements of good seamanship, followed immediately by a disaster, raises the presumption that such neglect caused or contributed to it. This rule applies as well to actions upon policies of insurance as to actions for negligence.

## 7. SAME—DEFECTIVE COMPASS—UNLAWFUL SPEED IN FOG.

A steamer provided with a defective compass, while running, in violation of law, at full speed in a fog, stranded upon a well-known reef. *Held*, that the violation of law and the unseaworthiness of the steamer raised the presumption that the stranding was the consequence of negligence and unseaworthiness, and were the proximate causes thereof.

## 8. SAME—KNOWLEDGE OF UNDERWRITER.

A steamer equipped with a defective compass is unseaworthy, and, so far as such unseaworthiness is a defense to the underwriter, it is immaterial whether it is known to the owner or not.

## On Motion for New Trial.

This was an action upon a policy of insurance, whereby the defendant insured the steamer *Spartan* in the sum of \$10,000 against all losses occasioned by perils of the sea, "excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz.: Damages that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew, or *want of ordinary care and skill in navigating said vessel*, and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and *all other unseaworthiness*; theft, barratry, or robbery." At the time of the loss, the *Spartan* was in the service of the Owen Sound Steam-ship Company, which had chartered her from the plaintiff in this case. The loss occurred June 19, 1883, while the steamer was bound upon her trip from Silver islet, upon the north shore of Lake Superior, to Owen sound, Ontario. When she left her port of departure, the weather was fair, and the steamer took a direct course for Whitefish point by way of Passage island. Midway between Silver islet and Passage island a dense fog arose, which continued more or less thick until the time of the stranding. She passed Passage island in safety, and about 8 o'clock in the evening of the 18th was put upon a course which should have carried her about seventeen miles south of Caribou island. Her navigation was left in charge of the second mate, Mr. Harbottle, who remained on watch until about half-past 1 o'clock in the morning of June 19th. Capt. McGregor, the master, had retired to his berth about 8 o'clock in the evening, after committing the charge of the vessel to Mr. Harbottle, and giving that officer the following written instructions for the navigation of the steamer: "If it continues thick at 10 o'clock p. m., keep her S. E. by E. until 3 a. m.; then keep her S. E. by E.  $\frac{1}{2}$  E. small, etc. If it clears, continue on your course S. E. by E.  $\frac{1}{4}$  E." The fog continued dense during the second mate's watch, and the steamer, under the instructions given, was run at full speed on the prescribed course, which was a quarter

of a point more southerly than usual. About half-past 1 o'clock the first mate, Mr. Waggoner, came on watch, and relieved Harbottle, the second mate. The vessel was then running at full speed. The weather was thick, and the fog dense, and so continued all night. She continued to run, at the rate of about 13 miles an hour, in a fog so dense that "you could not see anything,—you could not see the length of the boat,"—as Waggoner stated it, until about 2:20 A. M., somewhat less than an hour after the change of watch, when she stranded on Caribou island, and brought up about 400 feet from the shore. The weather was still so thick that the land could not be seen. There was no lookout maintained on the steamer, and on soundings taken, and the testimony indicated that "if the vessel had been running at half speed she might have been backed off." The defenses were that the losses were occasioned (1) by the want of ordinary care in the navigation of the vessel; (2) by her unseaworthiness in running with a defective compass. The jury returned a verdict for the defendant. The plaintiff moved for a new trial upon the grounds stated in the opinion of the court.

*F. H. Canfield*, for plaintiff.

*H. H. Swan*, for defendant.

BROWN, J. It is insisted that the court erred—

1. In admitting the protest made by the master and crew after the Spartan had been gotten off and taken to Windsor. The protest was admitted under the following circumstances: Plaintiff put in evidence the proofs of loss served upon the defendant. These proofs recited that "the said vessel, in the prosecution of a voyage, ran ashore on the north-east shore of Caribou island, and became a wreck and total loss, and was duly abandoned by her owners to the insurers, as will appear by certified copies of the protest of her master and mariners heretofore served on you herewith." We think it clear that in an action on a policy of insurance the protest is not admissible on behalf of the plaintiff. It is true there are several American cases which hold otherwise, but the weight of authority is decidedly the other way. The protest stands in the same position as any other declaration made in the interest of the party offering it. It is not so clear, however, that it may not be put in evidence by the defendant, though the better considered cases hold that it stands in the light of an ordinary admission made by an agent, which is not competent as against the principal unless it be part of the *res gestæ*. But where the protest is served with the proofs of loss, and made, in part, the basis of plaintiff's claim against the company, we think he should be held as so far making the statements his own that it should be admitted against him. It is true, a contrary ruling was made by the king's bench in *Senat v. Porter*, 7 Term R. 158; but, notwithstanding the positive opinion of Lord KENYON and his associates, the propriety of this decision may well be questioned. Indeed, we find it

difficult to reconcile it with *Insurance Co. v. Newton*, 22 Wall. 33, in which the proofs of loss consisted of affidavits giving the time, place, and circumstances of the insured's death, and the record of the finding of the jury upon the coroner's inquest. These were held admissible on behalf of the defendant. While the affidavits showed the fact of death, they also showed that the deceased committed suicide. It was held that, as they were intended for the action of the company, the latter had a right to rely upon their truth, and that, unless corrected for mistake, the insured was bound by them. "Good faith and fair dealing required that the plaintiff should be held to representations deliberately made, until it was shown that they were made under misapprehension of the facts, or in ignorance of material matters subsequently ascertained."

The fact that the protest was not attached to the proofs of loss is immaterial, for a paper referred to and described in a written instrument, so that it may be identified, is thereby made a part of the instrument the same as if it were incorporated with it. *In re Com'r's Washington Park*, 52 N. Y. 131; *Tonnele v. Hall*, 4 N. Y. 140.

The case of *Senat v. Porter* was followed by the same judge in *Christian v. Coombe*, 2 Esp. 490, and is usually cited by the elementary writers upon marine insurance as settling the law upon that subject. But the tendency of the American and some of the more recent English cases is to hold that, wherever a party has offered or made use of the statements of a third person in any legal proceeding as the basis of a claim against another, it may be used as an admission against him; thus, in *Brickell v. Hulse*, 7 Adol. & E. 454, affidavits of third persons, used by a party on motion before a judge, were held to be admissible in evidence in a subsequent action against the party so using them. The case of *Atkins v. Elwell*, 45 N. Y. 753, was an action brought to recover damages sustained by the plaintiffs by the fraud of the defendant on the sale of a ship to them. After the purchase, the ship was sent by the plaintiffs to San Francisco; but, encountering bad weather, she put into Rio Janeiro in distress, where a protest was made by the master before the consul. The defendant expressly denied making any representations as to her soundness, and offered in evidence the protest, as showing the statements of the master as to the soundness and condition of the ship at the time of the disaster. The court held it to be admissible. "It was a solemn instrument," said the court, "made by their agent, for their benefit, in the course of his duty. It was used by them in a matter of importance to them and others. It was used by them upon a question which was at issue in the action then upon trial, viz., the condition of a vessel at a time at which they in this action allege that she was unsound. How much weight should be given to it is not the point here. Whatever weight it had, the defendants were entitled to, as its statements, adopted by the plaintiffs, and used by them for their benefit in one instance, could not be repudiated by them in another."

See, also, 1 Phil. Ev. 449; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 622. In *Marine Ins. Co. v. Stras*, 1 Munf. 408; *Patterson v. Insurance Co.*, 3 Har. & J. 71; and *Doherty v. Farris*, 2 Yerg. 73,—the protest was offered by the plaintiff, and of course was ruled out.

In the view we have taken of this question, the fact that the master was not the servant of the plaintiff, but of the Owen Sound Steamship Company, becomes immaterial, since the plaintiff, by making the protest a part of the proofs of loss, has adopted and made it its own. It is not admitted at all upon the principle of agency.

2. The fact that the words "fogs and defective compass" are not contained in the written part of the protest setting forth the facts of the disaster, but are interlined in the printed part, does not affect the admissibility of the protest; but we think it meets the objection made to the statements of the master at the time the protest was made. The witness Waggoner, in answer to the question whether, at the time the protest was made, the attention of the master was called to the fact that the compass was defective, was permitted to answer that the master said that the compass was "a little out," and that he laid the disaster solely to the compass. This testimony was objected to upon the same ground as the protest, viz., that it was the admission of an agent after the event, and not a part of the *res geste*; and that it was not admissible to contradict the testimony of Capt. McGregor, because his attention had not been called to it upon cross-examination. But we think it was competent, in connection with the fact of making the protest, to show that the attention of the master was called to the subject of the defective compass, and that the words "fogs and defective compass" were inserted in the protest with his knowledge. The statements were made in giving instructions to the notary with respect to the protest, which was in itself an official act, and strictly within the line of the master's duty, and hence these statements do not fall within the ruling in *Packet Co. v. Clough*, 20 Wall. 528, or *Insurance Co. v. Mahone*, 21 Wall. 152, and the numerous other cases, wherein admissions made after the event, and not in connection with the performance of any official act, were excluded. We think the admissibility of this testimony is rather controlled by the cases of *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R. 9 Q. B. 468; *Railroad Co. v. Butman*, 22 Kan. 639; *Xenia Bank v. Stewart*, 114 U. S. 224; S. C. 5 Sup. Ct. Rep. 845; *Morse v. Connecticut R. Co.*, 6 Gray, 450; *Dowdall v. Pennsylvania R. Co.*, 13 Blatchf. 403. In all these cases the statements related to a past transaction, but they were made in connection with an act itself within the scope of the agent's duty, and were admitted upon that ground. In this case the admission is no broader than the statement of the master upon the stand that he could account for the loss in no other way; but it shows that his attention was directed to that feature of the case at the time the protest was made, and that it was not inserted by the notary upon his own motion. Indeed, he testified that he had the words inserted



himself. Under these circumstances, it is difficult to see how the plaintiff was prejudiced by its admission. If we suppose it to have been ruled out, the testimony of the master as to the defective condition of the compass would still remain, and the general purport of the evidence would be the same, even if the testimony were technically incompetent. The plaintiff suffered no injury by its admission, and has therefore no legal cause for complaint. *Cooper v. Coates*, 21 Wall. 105; *Allen v. Blunt*, 2 Wood & M. 128.

3. Objection was also made to the admission of the Canadian statute requiring moderate speed in a fog, upon the ground that it was intended to apply only to cases of collision, and also because the statutes of Canada are not enforceable in this court. The objection is without force. The act is entitled "An act to make better provision respecting the navigation of Canadian waters;" and, while it is intended primarily to lay down certain regulations for the prevention of collisions, the provisions of the act are general, and require the observance of the regulations under all circumstances. We are cited to no authority that acts of this description, and they are universal in all maritime countries, are limited in their application. In the *Case of Kestrel*, 4 Asp. 435, the act was treated as obligatory in a proceeding to suspend the certificate of the master of a vessel for his negligence in permitting her to be stranded. The *Spartan* was a Canadian vessel, and was navigating Canadian waters between two Canadian ports, and was bound to comply with the laws of Canada, and the insurers must be held to have contemplated this requirement in issuing the policy. 1 Phil. Ins. Dec. 736; *Peters v. Warren Ins. Co.*, 14 Pet. 99, 112. So far, however, as the question of speed is concerned, the point is hardly worth discussing, as the Canadian statute is the same as our own upon the subject. Indeed, these rules of navigation are now recognized as general laws of the sea, and constituting a kind of international code. *The Scotia*, 14 Wall. 171.

4. It is further claimed that the court erred in charging the jury that, "as the *Spartan* was violating the statute laws of Canada in running at full speed in a dense fog, plaintiff must show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or contributed to the stranding of the steamer, and that the burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant." This charge is claimed to have been erroneous, because it puts the burden of proof upon the wrong party. There is no doubt of the correctness of the general proposition that, in the absence of a specific stipulation in the policy, the insurer is liable for losses resulting from negligence not amounting to barratry. 1 Pars. Ins. 534, note; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213; *National Ins. Co. v. Webster*, 83 Ill. 470; *Fireman's Ins. Co. v. Powell*, 13 B. Mon. 311; *Citizens' Ins. Co. v. Marsh*, 41 Pa. St. 386; *Busk v. Royal Exch. Assur. Co.*, 2 Barn. & Ald. 73; *Walker*

v. *Maitland*, 5 Barn. & Ald. 171; *Bishop v. Pentland*, 7 Barn. & C. 219.

In the American cases it is broadly held that the underwriters are liable for losses occasioned by negligence. In the English cases it is discussed in a somewhat misleading manner as a question of remote and proximate cause, as if the insurer would not be liable if the negligence were the immediate cause of the loss; but we find no case holding directly that he would not be so liable. The true distinction seems to have been between cases of accidental or negligent stranding, and those wherein the stranding was one of the ordinary and expected incidents of the voyage. *Hearne v. Edmunds*, 1 Brod. & B. 388; *Bishop v. Pentland*, 7 Barn. & C. 219; *Rayner v. Godmond*, 5 Barn. & Ald. 225. In the latter class the insurers would not be liable.

In this case, however, there is an express exception of all perils and losses occasioned by the want of ordinary care and skill in navigation, and all unseaworthiness. In this connection we understand it to be the law that the violation of a statutory obligation, or a proved neglect to conform to the requirements of good seamanship, followed by a disaster, raises the presumption that such neglect contributed to it. This has been reiterated so many times in collision cases as to have become elementary. *Lownd*, Col. 88; *The Genesee Chief*, 12 How. 447, 463; *The De Soto*, 5 How. 465; *The Pennsylvania*, 19 Wall. 136; *The Fenham*, L. R. 3 P. C. 212; *The Lion*, 1 Spr. 44, 40; *The Northern Indiana*, 3 Blatchf. 92, 106; *The Leo*, 11 Blatchf. 225; *The Voorwarts & Khedive*, 5 App. Cas. 894, 900. In *Taylor v. Harwood*, Taney, 437, 444, the chief justice stated, in general terms, that "the omission of a known legal duty is such strong evidence of negligence and carelessness that, in every case of collision happening under such circumstances, I should hold the offending vessel as altogether at fault, unless clear and indisputable evidence established the contrary." We understand this principal to be of general application in all actions where the question of negligence is involved. *Shear. & R. Neg.* § 484. In *Jetter v. New York & H. R. R.*, 2 Keyes, 154, a charge that a street car proceeding at a rate forbidden by the city ordinances would render the company liable, because in such case the accident would be the result of their violating the city ordinances, was held to be proper, notwithstanding the decision to the contrary in *Brown v. Buffalo & S. L. R. R.*, 22 N. Y. 191; relied upon by the plaintiff here. See, also, *Massoth v. Delaware & H. C. Co.*, 64 N. Y. 524; *Langhoff v. Milwaukee R. Co.*, 19 Wis. 489; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228; S. C. 4 Sup. Ct. Rep. 369. All the authorities are reviewed in an elaborate opinion in *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387, and the case of *Brown v. Railroad Co.*, 22 N. Y. 191, distinctly repudiated.

The seventh section of the Canadian statute, already referred to, provides expressly that, in case of any damage to person or property

arising from the non-observance by any vessel or raft of any of the rules prescribed in the act, "such damage shall be deemed to have been occasioned by the willful default of the person in charge of such raft, or of the deck of such vessel at the time, unless the contrary be proven or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the rules necessary."

It is claimed, however, that this rule, enforced so often in cases of collision and in actions for negligence against carriers, should not be applied in actions upon policies of insurance, for the reason that the carrier is not exempted if his negligence contributes to the loss, notwithstanding the loss itself may be occasioned by a peril of the sea, while the insurer is liable wherever a peril of the sea contributes to the loss, though the ship may have been placed in such peril by the negligence of the insured. If this were true as a universal proposition, the exception in the policy of perils and losses consequent upon and arising from or caused by want of ordinary care and skill, would be of little or no avail, for no matter how gross the negligence or how direct the loss consequent thereon, if a peril of the sea intervened to produce the disaster, the company would be liable. The exception is not only of all "losses and misfortunes," but of all "perils" caused by negligence. The inference from this is that the company would be exonerated notwithstanding the immediate loss be by a peril of the sea, if such peril arose from negligence or unseaworthiness. It is not intended, in this connection, to impugn the authority of the numerous cases which hold that, where the negligent act has ceased to operate at the moment of the disaster, such disaster shall be referred to the peril, rather than to the negligence. Examples of such are *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. New York Cent. R. Co.*, 13 Gray, 481; *Daniels v. Ballantine*, 23 Ohio St. 532; *Railroad Co. v. Reeves*, 10 Wall. 176; *Souter v. Baymore*, 7 Pa. St. 415. But where the negligent act continues to be operative up to the very instant of the loss, we find it difficult to escape the conclusion that it is a "peril" caused by negligence, and by negligence alone, even if the loss itself were to be attributed to the peril rather than to negligence.

The case of *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, is a leading case upon the question of proximate and remote cause. The policy was general, containing no exception of this kind, and the court held the company not liable for barratry, though liable for negligence, and that a loss by fire, intentionally set by the master and the crew, was a loss by barratry. "Such a loss," says Mr. Justice STORY, "is a peril and loss attributable to the barratry as its proximate cause, as it concurs, as the efficient agent, with the element *eo instanti* when the jury is produced. If the master or the crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water, and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the sea or rivers, though the flow of the water should co-operate in producing

the sinking." This language appears to be somewhat in conflict with that used by the English courts, with respect to proximate and remote cause, in *Busk v. Royal Exch. Assur. Co.*, 2 Barn. & Ald. 73; *Walker v. Maitland*, 5 Barn. & Ald. 171, and *Bishop v. Pentland*, 7 Barn. & C. 219. In the subsequent case of *Insurance Co. v. Transportation Co.*, 12 Wall. 194, 199, it is said that, "when one of several successive causes is sufficient to produce the effect, (for example, to cause a loss,) the law will never regard an antecedent cause of that cause or the *causa causans*. In such a case, there is no doubt which cause is the proximate one, within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished."

It is only within a comparatively few years that the clause exempting the underwriter from the consequences of negligences has been introduced into marine policies, and hence cases involving the constructing of this clause are not numerous; but we take it that wherever, under the ordinary form of a policy, the insurer would be exonerated from the consequences of a peril occasioned by barratry, he would, under this clause, escape liability if the peril were occasioned by the negligence of the master and crew, and that this is a question for the jury in each case. *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469. This appears to have been the construction given to a similar provision by Mr. Justice Woods in *Levi v. New Orleans Ins. Ass'n*, 2 Woods, 63, which was an action upon a policy to recover a loss resulting from a collision occasioned by the negligence of the pilot of the insured vessel. The fault committed by the vessel was in the non-observance of a rule or custom of the river, that ascending boats should run under the points near the shore, so as to avoid the current, while descending boats followed the main channel of the river, so as to take advantage of the current. The policy provided that the boats should be navigated "free from any loss or damage by barratry, or by the negligence of those in charge of the boat, at or before the time of any accident or disaster;" and it was held that, as there was negligence in the management of the insured vessel at the time of the collision, there could be no recovery. See, also, *St. John v. American Mut. Ins. Co.*, 11 N. Y. 519; *Lund v. Tyngsboro*, 11 Cush. 563; *Butler v. Wildman*, 3 Barn & Ald. 398.

In *Thompson v. Hopper*, 6 El. & Bl. 937, which was an action upon a time policy, it appeared the plaintiff sent the ship to sea in an unseaworthy state, and caused her to anchor in the offing in that state. While there, she was caught in a storm, and driven ashore. There was evidence from which the jury might have drawn the conclusion that, although the unseaworthiness was not the immediate cause of loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. It was held that the defense was made out if the

misconduct of the plaintiff occasioned the loss, though it was not its immediate cause. In delivering the judgment, Lord CAMPBELL observed:

"Is it to be said, then, that, to exempt the assurers from liability, the misconduct of the assured must be the direct and proximate cause of the loss? We think that, for this purpose, the misconduct need not be the *causa causans*, but that the assured cannot recover if their conduct was *causa sine qua non*. In that case they have brought the misfortune upon themselves by their own misconduct, and they ought not to be indemnified. The very object of insurance is to indemnify against fortuitous losses which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the efficient cause of loss, the insurers are not liable."

In *Ionides v. Universal M. Ins. Co.*, 14 C. B. (N. S.) 279, a policy of insurance on a ship-load of coffee contained the words: "Free of capture, seizure and detention, and all the consequences thereof, and of any attempt thereat, and free from all consequences of hostilities, riots, and commotions." The ship was wrecked on Cape Hatteras, where there was a light-house, the light of which, however, had been extinguished by the Confederates. A large portion of the cargo might have been saved had not the Confederates prevented it. It was held that there was a total loss, by perils of the sea, of that portion of the cargo which could not have been saved, notwithstanding the hostile extinguishment of the light, but that the loss of that part which might have been saved but for the interference of the Confederates was a consequence of hostilities, within the exception of the policy, and therefore, as to that portion, the insurers were not liable. The case is a very instructive one upon the subject of proximate and remote cause, and apparently is in full accord with that of the supreme court in the case of *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213.

We see nothing inconsistent with these cases in the subsequent ones of *Dudgeon v. Pembroke*, 1 Q. B. Div. 96, S. C. 2 App. Cas. 284, and *West India, etc., Co. v. Home, etc., Ins. Co.*, 6 Q. B. Div. 51. Nor are we much impressed with the distinction drawn in one or two cases between actions upon bills of lading and upon policies of insurance, with respect to the liability of the defendant for losses occasioned by a peril of the sea. This distinction seems to be repudiated in the case of *The Portsmouth*, 9 Wall. 684, and even if sound, is without force in the construction of the policy in this case. Few of the English cases are of any value, as their policies do not seem to contain the proviso exempting the underwriter from perils and losses occasioned by negligence and unseaworthiness.

We have found it impossible to reconcile our views, as to the proper construction of this policy, with the opinion of the Illinois court of appeals in *Greenwich Ins. Co. v. Raab*, 11 Bradw. 636, in which it was held, under a policy of this description, that the underwriter was liable notwithstanding the loss was produced by the want of care in the navigation of the vessel. The cases of the *National*

*Ins. Co. v. Webster*, 83 Ill. 470, and the others cited in support of this conclusion, are not controlling, as the policies in none of them contained this provision. We think the learned court was misled by the language of the early English cases.

We have no criticism to make of *Western Ins. Co. v. Cropper*, 32 Pa. St. 351, and *Commonwealth Ins. Co. v. Cropper*, 21 Md. 311, as the question in each case was as to the extent of the liability of the company under what was known as the "steam-boat clause." The opinions throw no light upon the present controversy.

Upon the whole, we have come to the conclusion that there was no error in the instruction complained of. If there be any significance at all to the exception of perils and losses caused by negligence or unseaworthiness, they surely ought to suffice for the exoneration of the underwriter in a case where a steamer, equipped with a compass known to be defective, is driven in a dense fog, with unabated speed, and in direct violation of a local statute, upon an island lying but eight miles off her usual track. To say that, under such circumstances, the negligence or unseaworthiness was not the proximate or efficient cause of the peril or loss seems to us a distinction too subtle and refined for the ordinary apprehension. It is difficult to conceive of a loss by negligence or unseaworthiness, unconnected with a sea peril. But under this policy, if the peril be so produced, the subsequent loss is within the exception. The question as to the cause of the loss was fairly left to the jury, and we see no reason to differ from their finding.

5. That the court erred in charging the jury that "if there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding of the vessel was caused by or consequent upon or arose from such defects in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover." It may be assumed that there is no implied warranty of seaworthiness in a time policy, and the mere fact that the vessel was unseaworthy would not preclude a recovery in case of a loss unconnected with the defect; but the policy contains an express exception of liability for losses occasioned by this cause, and whether it was known or unknown would be immaterial. The exception amounts to a warranty that the loss shall not be caused by unseaworthiness, and the ignorance of the owner of the defect in the compass would not affect his right to recover. *The Glenfruin*, 5 Asp. 413; *Work v. Leathers*, 97 U. S. 379; 1 Pars. Ins. 337, 368.

This covers all the points made in the briefs of counsel. The motion for a new trial must be denied, and judgment will be entered upon the verdict.

## UNITED STATES v. MITCHELL.

*(District Court, N. D. New York. February 22, 1886.)***CONSUL—SUIT ON VICE-CONSUL'S BOND FOR MONEY PAID AS SALARY OF CONSUL, AND NOT PAID OVER.**

M., a vice-consul in Japan, being left in charge of the consulate during the absence of the consul, drew on the treasury a draft for expenses and salaries, including \$362.78 for salary of the consul, and this amount was duly credited, but subsequently disallowed. The consul received his salary from the government and resigned. The amount paid to M. was never, so far as appeared, paid over to the consul, and the government brought suit on M.'s bond, to recover the amount. *Held*, that it was entitled to recover.

The defendant was from July 1, 1871, to October 1, 1874, vice-consul at Kanagawa, Japan. This action is upon a bond, signed by him as principal; one of its conditions being that he should account for and pay over all moneys received by him in his official capacity. On the twenty-second of October, 1873, Charles O. Shepard, the consul, returned to this country, on leave, giving instructions to the defendant to take charge of his affairs during his absence. On the twenty-seventh of November following, Shepard resigned. It was the custom at the consulate, when the fees received were insufficient to pay salaries and other expenses, to draw upon the secretary of the treasury for the balance. On the second of June, 1874, such a draft was drawn. An account accompanied it. Among other items were the following:

1874, March 31. To salary of Mr. Shepard, late consul, from October 1 to 31, 1873, inclusive, - - - - -	\$252 72
To salary of Mr. Shepard, late consul, from November 1st to 27th, inclusive, at one-half the salary of the consulate, - - -	\$110 06

It is to recover this sum, (\$362.78,) paid to the defendant while acting consul, on account of the salary of the late consul, Shepard, that this action is brought. The account was examined by the fifth auditor, and in August, 1874, the item was apparently allowed as properly paid to and received by the defendant. The mistake was soon after corrected, and in September, 1874, the following entry appears in the treasury accounts: "Salary of C. O. Shepard, adjusted with the late consul, erroneously charged by vice-consul, \$362.78." In June, 1874, the same sum appears in Shepard's account as credited him by the fifth auditor. The defendant swore, in substance, that no demand was made upon him till the commencement of this suit, in February, 1885. In the letter of the acting comptroller of December 11, 1884, he refers to the fact that the defendant and his sureties "have ignored the repeated requests of this office for payment of the balance due to the United States."

*Martin I. Townsend*, U. S. Atty., for plaintiff.

*H. J. Swift*, for defendant.

*Coxe, J.* The facts are substantially undisputed. In June, 1874, the defendant received from the plaintiff \$362.78. This money did

not belong to the defendant. Upon no possible theory had he a right to retain it as his own. Shepherd resigned in November, 1873. Assuming that the defendant could lawfully draw, six months thereafter, for Shepard's salary, or retain the amount from the fees received at the consulate, it is entirely clear that he could only do this for the purpose of paying the amount to Shepard. If he paid Shepard it would probably afford a sufficient answer to the present claim upon him. But the payment to Shepard was a defense to be pleaded and proved. Upon this record there is no word of evidence that the defendant has ever parted with the money. For aught that appears he may have it at the present time. It is argued on his behalf that the presumption is that he paid it to Shepard. Is this so? When the draft was drawn in June, 1874, Shepard was not consul and not at the consulate. During the same month, June, 1874, the auditor seems to have allowed the amount to Shepard in his account with the government. This necessarily occurred before the draft could have reached this country, and when Shepard and the treasury officers were ignorant of the defendant's action. If inferences are to be indulged in, is it probable that Shepard, having received credit for his salary at the treasury, would again receive it from the defendant? When defendant's draft reached this country, the United States owed Shepard nothing, and never owed him anything thereafter. Shepard could not have taken the money from the defendant without knowing that he had no right to receive it. The presumption would certainly, in the absence of proof, be against such a questionable transaction.

Permission was given to the defendant, at the trial, to amend his answer, and prove payment to Shepard, but he did not avail himself of this opportunity. The case, as it appears upon the proof now before the court, is a simple one. A., residing in New York, owes B., residing in Buffalo, \$100. A. sends the money to C., also residing in Buffalo, and receives a receipt acknowledging that he (C.) has received \$100 to hand to B. In the mean time B. goes to New York, and receives payment directly from A. Is there any reason why C. should not return the money? There is no presumption that he has paid the money to B. If he has done so in good faith, he should prove it. So, in this case, the defendant received \$362.78 from the plaintiff to pay to Shepard. Before he could, in the ordinary course of business, have paid Shepard, the latter received the amount from the plaintiff. If the defendant legally disposed of the sum so received, he should have proved it. Having failed to do so, no reason is seen why he should not now pay it back.

The length of time in bringing this action would be fatal in a case between individuals, but not so where the United States is the party plaintiff.

The plaintiff is entitled to the judgment demanded in the complaint.



## WOLFF and others v. SPALDING, Collector, etc.

(Circuit Court, N. D. Illinois. December Term, 1885.)

CUSTOMS DUTIES—CASTINGS OF IRON, PART OF ICE-MACHINE, held to be "castings of iron, not otherwise provided for," and dutiable at one and one-fourth cents per pound, under the tariff act of March 3, 1883.

At Law.

Percy L. Shuman, for plaintiffs.

R. S. Tuthill and Chester M. Dawes, U. S. Attys., for defendant.

BLODGETT, J. Plaintiffs imported certain cast-iron plates pertaining to and intended for a part of an "ice-machine." They were charged with duty at 45 per cent. *ad valorem*, under clause 216 of Heyl's Compilation, as a manufacture of iron not otherwise provided for. The plaintiffs claim these goods are dutiable, under clause 157 of Heyl, at one and one-quarter cents per pound, as "castings of iron not specially enumerated or provided for." The proof shows the plates in question to be heavy cast-iron plates, intended as part of an "ice-machine." They were not fitted and ready to be put into the machine without further work upon them, and therefore cannot be said to be a manufacture of iron; but they fall apparently and appropriately, it seems to me, under the description of "castings of iron not specially enumerated and provided for," under section 2502, as amended by the act of March 3, 1883, Schedule C. These duties having been paid under protest, and appeal prosecuted and suit brought in apt time, I think the plaintiffs are entitled to recover.

The issues are found for the plaintiffs.

## MANDEL and others v. SPALDING, Collector, etc.

(Circuit Court, N. D. Illinois. December Term, 1885.)

CUSTOMS DUTIES—SILK ARRASENE held to be dutiable at 30 per cent. *ad valorem*, as silk thread, under Schedule L of tariff act March 3, 1883.

At Law.

Percy L. Shuman, for plaintiffs.

R. S. Tuthill and Chester M. Dawes, U. S. Attys., for defendant.

BLODGETT, J. The plaintiffs imported a class of goods known to the trade as "arrasene." It was classed by the collector as a manufacture of silk, under the last paragraph of Schedule L, § 2502, as amended by the act of March 3, 1883, and charged at 50 per cent. *ad valorem*. Plaintiff claims it is dutiable, as silk thread, at 30 per cent. *ad valorem*, under paragraph 381 of Heyl's Compilation of the

Revenue Law. The goods in question are a manufacture formed of two or more strands or threads of silk, with short cross-threads interlaced or woven so as to make a kind of fringed thread or embroidery yarn, and the proof shows that the only use of these goods is for an embroidering thread or yarn. I think, therefore, that while it is not produced by spinning in the manner of ordinary thread, and has passed through another process in order to produce it in the condition it now is, at the same time, as its only use is for embroidering thread, it should be properly classed as silk thread, and charged with 30 per cent. *ad valorem* duty. The issue is therefore found for the plaintiffs.

---

PROCTER and another v. SPALDING, Collector, etc.

(Circuit Court, N. D. Illinois. December Term, 1885.)

CUSTOMS DUTIES—STEEL PICKS, ETC., held to be "track tools," and dutiable at two and one-half cents per pound, under Schedule C, tariff act March 3, 1883.

At Law.

Percy L. Shuman, for plaintiffs.

R. S. Tuthill and Chester M. Dawes, U. S. Attys., for defendant.

BLODGETT, J. The plaintiffs imported a quantity of steel picks, spike hammers, or mauls, for driving spikes, and clawed bars. They were classed by the collector as a manufacture of metals, under clause 216 of Heyl's Compilation, and charged with duty at 45 per cent. *ad valorem*. Plaintiffs claim they should have been classed as "track tools," and charged with duty at two and a half cents per pound, under clause 165 of Heyl's Compilation. The proof shows that the goods in question are known to the trade as "track tools," and used mainly by the railroad companies in laying and repairing railroad tracks, although some of them are used to some extent for mining purposes. I conclude, therefore, that under the proof the proper commercial designation of these goods is "track tools," and that they fall properly within the provisions of clause 165, as contended, and should have been charged with duty at two and a half cents per pound.

The issue is found for the plaintiffs.

## THE STOCKTON LAUNDRY CASE.

*In re* TIE LOY.*(Circuit Court, D. California. February 16, 1886.)*

1. CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—CITY ORDINANCE—DUE PROCESS OF LAW—PRIVILEGES AND IMMUNITIES OF CITIZENS OF UNITED STATES—EQUAL PROTECTION OF LAWS.

A city ordinance that makes it an offense for any person to carry on a laundry where clothes are washed for pay, within the habitable portion of the city, is unconstitutional.

2. HABEAS CORPUS—VIOLATION OF UNCONSTITUTIONAL CITY ORDINANCE—REV. ST. U. S. § 753.

A party who is held in custody for the violation of a city ordinance that is in conflict with the fourteenth amendment to the United States constitution is entitled to be discharged on *habeas corpus*.

On *Habeas Corpus*.

R. W. Bennett, for petitioner.

F. H. Smith, City Atty. of the City of Stockton, and Alfred Clarke, for respondent.

SAWYER, J. The petitioner is in custody upon a charge of violating the provisions of an ordinance of the city of Stockton, which reads as follows:

"Section 1. The establishment of public laundries and public wash-houses, where clothes and other articles are cleansed for hire, within those portions of said city, other than the portions hereinafter especially mentioned, being injurious and dangerous to public health and public safety, and prejudicial to the well-being and comfort of the community, it shall be unlawful for any person or persons to establish, maintain, carry on, or conduct, or cause to be established, maintained, carried on, or conducted, any public laundry or public wash-house, within any portion of the city of Stockton other than that portion of said city lying west of Tule street and south of Mormon channel."

"Sec. 7. Any person violating any of the provisions of this ordinance shall be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

This ordinance is much broader in its scope than any heretofore considered by this court. It absolutely and unconditionally forbids the keeping of a laundry for washing clothes for hire, at any point within the inhabited, and even within the habitable, part of the city of Stockton; the remainder of the city being in the uninhabitable marshes and sloughs. The isolated position of the laundry, the character of the structure, and the perfection or imperfection of the appliances for rendering the operation safe and free from unwholesomeness and offensiveness to the senses are not factors to be considered under the ordinance. All must go, safe or unsafe, healthy or unhealthy, offensive or not offensive. It makes no difference what the character of the work is. No decision of any court in this state or elsewhere has been brought to the notice of the court holding an ordinance so sweeping and exclusive in its provisions to be valid, since

or even before the adoption of the fourteenth amendment to the national constitution. In my judgment, the *Case of Yick Wo*, 9 Pac. Rep. 139, recently decided by the supreme court of California, cited the other day in *Wo Lee's Case*, ante, 471, does not reach it, either in its facts or the principles involved. This ordinance does not regulate,—it extinguishes. It absolutely destroys, at its chosen location, an established ordinary business, harmless in itself, and indispensable to the comfort of civilized communities, and which cannot be so conveniently, advantageously, or profitably carried on elsewhere. On the other hand, it appears to the court that it is fully covered by the case of *Yates v. Milwaukee*, decided by the supreme court of the United States, 10 Wall. 505, which is authoritative. In that case the court says:

"The mere declaration by the city council of Milwaukee that a certain structure [a wharf] was an encroachment or obstruction did not make it so; nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities."

If the rural city of Stockton, which, as usual in such cities, is, in the greater part, not compactly built up, has authority to prohibit, within its inhabited limits, the washing of clothes for hire,—not only a useful but an absolutely necessary occupation in any civilized community,—it is because it has the power to declare that occupation and every other that may be followed by civilized man to be a public nuisance, without regard to the question whether it is in fact a nuisance or not. That is just what the supreme court of the United States says it cannot do. If the city of Stockton can prohibit the washing of clothes for hire within its inhabited and habitable limits, it can prohibit the washing of clothes by any citizen, for him or herself, anywhere within the city of Stockton. Washing for hire cannot make the operation a nuisance if it be not otherwise a nuisance. One may cook his dinner in such manner and under such conditions as to render the operation extremely dangerous, and constitute it a nuisance. Unfortunately, this necessary and ordinarily harmless act has sometimes been so performed as to be dangerous. Does it follow from this fact that all the inhabitants of the city of Stockton may, under the police power of the state, be lawfully prohibited from cooking their meals within the habitable limits of that city? It is not apparent why they may not be thus prohibited if this ordinance be valid under the power invoked, or any other power. Indeed, if this ordinance be valid, it is difficult to perceive what rights the people of California have which a municipal corporation is bound to respect. Of course, no one can in fact doubt the purpose of this ordinance. It

means, "The Chinese must go;" and, in order that they shall go, it is made to encroach upon one of the most sacred rights of citizens of the state of California,—of the Caucasian race as well as upon the rights of the Mongolian. It should be remembered that the same clause in our constitution which protects the rights of every native citizen of the United States, born of Caucasian parents, equally protects the rights of the Chinese inhabitant who is lawfully in the country. When this barrier is broken down as to the Chinese, it is equally swept away as to every American citizen; and in this instance the ordinance reaches American citizens as well as Chinese residents.

This occupation is not a nuisance *per se*, nor one that is *prima facie* a nuisance,—like a slaughter-house, a house for the manufacture or storage of gunpowder or dynamite, or many others that might be mentioned. It can only become a nuisance upon gross negligence or carelessness, or gross imperfections in the arrangements and appliances by means of which it is carried on. It is one of the most common, ordinary, and necessary employments, in which every one may engage, as of common right, upon terms of equality, not only as to this employment, but upon terms of equality with those who engage in any other ordinary, necessary, or useful occupation. Cleanliness is necessary to civilization,—necessary to the health, comfort, and happiness of a civilized people. Without it, every man, woman, and child would individually, him or herself, become a nuisance to his or her neighbor. The right to labor in this or any other honest, necessary, and in itself harmless calling, where it can be the most conveniently, advantageously, and profitably carried on without injury to others, is one of the highest privileges and immunities secured by the constitution to every American citizen, and to every person residing within its protection.

In *Ward v. Maryland* the United States supreme court observes:

"Beyond doubt these words [privileges and immunities] are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one state to pass into any other state of the Union for the purpose of *engaging in lawful commerce, trade, or business without molestation*, to acquire personal property, to take and hold real estate," etc. 12 Wall. 430.

So, in the *Slaughter-house Cases*, Mr. Justice FIELD remarks upon these terms:

"*The privileges and immunities designated are those which of right belong to citizens of all free governments. Clearly, among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.*" 16 Wall. 97.

Justice BRADLEY, in discussing the question as to what is embraced in the privileges and immunities secured to citizens, among other equally pointed and emphatic declarations, says:

"*In my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of the most valuable rights, and one which the legislature of a state can-*

*not invade, whether restrained by its own constitution or not."* 16 Wall. 113, 114.

He also enumerates, as among the fundamental rights embraced in the privileges and immunities of a citizen, all the absolute rights of individuals classed by Blackstone under the three heads: "The right of personal security, the right of personal liberty, and the right of private property." *Id.* 115. And in relation to these rights he says:

"In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty, as well as property, without due process of law. Their right of choice is a portion of their liberty. Their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section." *Id.* 122.

And Mr. Justice SWAYNE supports this view in the following eloquent and emphatic language:

"Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property." 16 Wall. 127. See *Parrott's Case*, 6 Sawy. 373; S. C. 1 Fed. Rep. 481.

The police power is invoked to sustain this ordinance, but the police power only extends to the regulation of the necessary pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community. It does not extend to the destruction or driving to inconvenient and unprofitable localities of necessary or useful occupations, carried on in such manner as to be harmless. It is not easy to define the police power by general terms, in advance, so that it will embrace every case that ought to be embraced, and exclude every case that ought to be excluded. In the recent case of *New Orleans Gas-light Co. v. Louisiana Light & Heat, etc., Co.*, 6 Sup. Ct. Rep. 252, the supreme court observes:

"In the *Slaughter-house Cases*, 16 Wall. 62, it was said that the police power is from its nature incapable of any exact definition or limitation; and in *Stone v. Mississippi*, 101 U. S. 818, that 'it is easier to determine whether particular cases come within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate.'"

And the court then added:

"Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme laws of the land, \* \* \* [and, under color of the police power] objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution." 6 Sup. Ct. Rep. 258.

It does not appear to me to be difficult to determine that this sweeping, exclusive, destructive, prohibitory ordinance, making it an offense to pursue one of the most ordinary and necessary occupations, without regard to the manner of its pursuit, or the character of the appliances with which it is carried on, is not within the police power of the state. To hold otherwise would, in my judgment, clearly be, under color of the police power, to take in "objects not within its scope" which "cannot be secured at the expense of the protection afforded by the federal constitution," and to "encroach upon \* \* \* rights granted and secured by the supreme law of the land," which the supreme court says cannot be done. If the foregoing extracts from the opinions of the justices of the supreme court give a correct idea of the privileges and immunities protected by the constitution of the United States, then this ordinance in question, it seems to me, violates that clause of the fourteenth amendment which says: "No state shall *make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;*" for this ordinance does absolutely prohibit, not only Chinese, but citizens of the United States, from following, within the inhabited part of the city of Stockton, under any circumstances, one of the most ordinary, necessary, and, when properly conducted, harmless, occupations of civilized man.

Under the same definitions, this ordinance also violates the clause which secures the personal liberty of the citizen. So, also, as the laundrymen have already fitted up their laundries suitably for the purpose, and established their business, to now drive them out to inconvenient and unsuitable localities would be to limit the use of their property and convert it to other purposes and uses to which it is unfitted, and, to that extent, deprive them of their property and its use without due process of law, in violation of the last clause of section 2 of said amendment. So, also, to thus drive the laundrymen unconditionally out of Stockton, while other parties are entitled to wash clothes not for hire, and where other parties are entitled to pursue other ordinary and no more necessary or less harmful occupations, is to deprive them of the equal protection of the laws, within the meaning of the same inhibitory clause. Thus it seems clear to my mind that this ordinance violates the constitution of the United States in all the particulars indicated, and that it is utterly void. If so, the petitioner is "in custody in violation of the constitution of \* \* \* the United States," within the meaning of section 753 of the Revised Statutes, and he must be discharged.

The respondent relies upon article 11, § 11, of the state constitution, to sustain the ordinance, which provides that "any county, city, etc., may make and enforce within its limits all such local police, sanitary, and other regulations *as are not in conflict with general laws;*" also the first clause of section 524 of the Acts of 1883, relating to cities of the class in question, giving power "to pass ordinances *not in*

*conflict with the constitution and laws of the state or of the United States;"* and section 530, authorizing the common council to define nuisances. Laws 1883, pp. 211-214. But if the views presented are correct, this ordinance is not a "regulation," but a "destruction," of a lawful business, at the location selected for carrying it on, and does not fall within the police power of the state, and is "in conflict with general" and the supreme "law" of the land,—the national constitution,—and is not within any lawful power so conferred by either the state constitution, or statutes of the state.

In pursuance of the views expressed, the petitioner must be discharged; and it is so ordered.

---

UNITED STATES *v.* WARNER and another, impleaded, etc.

(Circuit Court, S. D. New York. February 13, 1886.)

1. NATIONAL BANKS—INDICTMENT—AIDING AND ABETTING DIRECTOR IN MISAPPLYING FUNDS OF BANK.

An indictment seeking to charge defendants with aiding and abetting a director of a national bank in misapplying the funds of the bank, must state facts showing a misapplication of money of the bank committed by the director.

2. SAME—MISAPPLICATION OF FUNDS—OVERDRAFT BY DIRECTOR.

A director of a national bank, who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains money from the bank to which he has no right, by means of an overdraft, made with intent to defraud, and converts the same to his own use, in fraud of the bank, is guilty of a misapplication of the funds of the bank.

BENEDICT, J. The brief in behalf of the government, submitted yesterday, fails to point out any way of escape from the difficulty in the indictment, in its present form, which was apparent at the time of the oral argument. That difficulty is that the indictment contains no averment of a conversion by Ward of the money of the association which the indictment states was paid by the association to Warner. The indictment seeks to charge the defendants, Warner and Work, as aiders and abettors of Ferdinand Ward in a willful misapplication by Ward of the money of the Marine Bank, of which association Ward was at the time a director. An indictment of this character, as all concede, to be good against the defendants, Warner and Work, must state facts showing a misapplication of the money of the association committed by Ward.

The supreme court of the United States, in *U. S. v. Britton*, 107 U. S. 666, S. C. 2 Sup. Ct. Rep. 512, has expressly declared a conversion of the funds of the association by the party charged to be a necessary ingredient of the offense of misapplying the funds by an officer of the association. According to this decision, an essential fact to be averred and proved in this case is the conversion by Ward



of the moneys in question. This essential fact the indictment omits to state. There is a statement that Ward intended that he and Warner and Work should convert to their own use the money in question, but there is no statement that such a conversion by Ward was thereafter effected. This omission, under the decision referred to, must be held fatal; and for this reason, therefore, there must be judgment for the defendants, Warner and Work, upon the demurrer.

The argument made at the hearing upon the demurrer was not confined to matters of form, and omissions capable of correction, but assumed a wider scope, and renders it proper for me, at this time, to say for the information of counsel, that I do not assent to the proposition that no offense against the laws of the United States is committed by a director of a national bank who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains money from the bank to which he has no right, by means of his overdraft, made with intent to defraud, and converts the same to his own use in fraud of the bank. In my opinion, the statute is not confined to acts done by an officer of the bank in the exercise of power acquired by means of his office. Its intention was to punish certain acts, which it describes, when such acts are done by one holding the relation to the bank of president, director, cashier, teller, clerk, or agent. Among the acts enumerated is the act of misapplying money of the association, and, as I conceive, a conversion, by a director, of money of the bank of which he has acquired the possession or control by means of his overdraft, drawn without right and with intent to defraud, would constitute a misapplication of money of the association, within the meaning of the statute. Such act would, moreover, involve a violation of duty on the part of the director.

The present indictment, as already pointed out, does not state such a case, and for the reasons given cannot be upheld. What has been said applies as well to the counts for abstraction, as to the counts for misapplication. I see nothing in the point made that each count in the indictment is really two counts.

Let there be judgment for the defendants upon the demurrer.

POST and others v. T. C. RICHARDS HARDWARE Co.<sup>1</sup>

(Circuit Court, D. Connecticut. February 11, 1886.)

1. PATENTS FOR INVENTIONS—DESIGN PATENTS.

A claim for "a new and original design for a curtain and loop, consisting of an ornamental metallic chain, in connection with a curtain adapted to be gathered to the side of the window and be held by said chain, substantially as described," construed to be, so far as the chain is concerned, for any ornamental metallic chain used to loop curtains.

2. SAME—PATENTABLE DESIGN.

If the substitution of any metallic loop for a silk or woolen loop for curtains is a "design," within the meaning of the statute, (which point was raised but not decided,) it is clear that it is not a patentable design.

3. SAME—SUBSTITUTION OF MATERIAL.

The mere substitution of one material for another, in the construction of or for the purpose of an ornament, the ornament to be of any approved form, cannot properly be patentable. There is nothing which the law deems "new" in a mere change of that sort.

In Equity.

Wm. Edgar Simonds, for plaintiffs.

Frank L. Hungerford, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the infringement of design patent No. 11,947, issued to Edgar S. Gergason, August 17, 1880, for a curtain and loop. The complainant having made profert of the patent, the defendant has demurred upon the following grounds:

"(1) That it appears upon the face of the letters patent recited in the said complainant's bill of complaint that the commissioner of patents exceeded his jurisdiction in granting and issuing said letters patent. (2) Because it appears upon the face of the letters patent, recited in the said complainant's bill of complaint, that said invention or discovery, if any such there be, is not a design within the meaning of the act of congress in such case made and provided, and cannot be protected by letters patent therefor; that is to say, the alleged design is not a 'new and useful design for a manufacture, bust, statue, alto-relievo, or bas-relief;' nor a 'new and original design for the printing of woolen, silk, cotton, or other fabrics;' nor a 'new and original impression, ornament, patent, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture;' nor a 'new, useful, and original shape or configuration of any article of manufacture.' (3) Because the claim of said design letters patent does not cover any patentable invention, but is for matters and things which do not involve patentable novelty, in view of the well-known prior act, of which the court will take judicial knowledge."

The specification describes the patented design as follows:

"Heretofore curtains have been looped back at the sides, by means of cords or braids, ornamental or otherwise, which have been attached to the sides or casing of the window or door, and passed around the folds of the material. These loops have been made of silk or woolen, or of an inferior material covered with silk or woolen, and have been of a perishable nature, soon becoming frayed and moth-eaten. The leading feature of my design consists in looping back a curtain by means of an ornamental chain in the place of the

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

customary cord. The curtain is of that class which is gathered to one side and looped. The chain consists of a series of links, with a ring at each end, which rings are passed over an ornamental hook attached to the side of the casing of the window or door to which the curtains are applied. One end of the chain can be permanently united to the hook if desired, as it is only necessary to unhook one end to loop or unloop the curtains. \* \* \* My invention is especially adapted to curtains made of heavy, rich, and ornamental silk or woolen goods, and particularly to those which are hung upon metallic bars or supports at the top, the whole presenting a superior symmetry and finish, much more elegant than when the curtains are looped back by cords in the customary manner. The chains can be made of a variety of ornamental forms, and with a high degree of finish, and will retain their beauty for an almost unlimited period of time."

The claim is for "a new and original design for a curtain and loop, consisting of an ornamental metallic chain, in connection with a curtain adapted to be gathered to the side of the window, and be held by said chain, substantially as described."

It will be observed that no new form or shape or fold is given to the curtain, and that the loop has no new form, shape, or impression; but, on the contrary, it may have a variety of forms. It is the old loop of silk or woolen; but it is made of metal. Nothing is requisite except that it shall be metallic and shall be ornamental. The patent is for any ornamental metallic chain used to loop curtains.

The plaintiffs urge, with truth, that the metallic chain is in pleasing contrast with the curtain, and has, in connection with the curtain, a beauty of appearance, and is an ornament to the curtain, and that "the thing invented or produced, for which a [design] patent is given, is that which gives a peculiar or distinctive appearance to the manufacture or article to which it may be applied, or to which it gives form." *Gorham Co. v. White*, 14 Wall. 511. It is therefore claimed that the patented thing is a "design," within the meaning of the statute. It is not clear that the substitution of any metallic loop for a silk or woolen loop is a "design" of the character which the statute contemplates; but, without deciding that question, it is clear that if such a change can properly be called a design, it is not a patentable design. The mere substitution of one material for another, in the construction of or for the purposes of an ornament, the ornament to be of any approved form, cannot properly be patentable. There is nothing which the law deems "new" in a mere change of that sort.

The demurrer is allowed.

ALABASTINE CO. v. RICHARDSON and others.<sup>1</sup>*(Circuit Court, D. Massachusetts. February 23, 1886.)*

## PATENTS FOR INVENTIONS—LAWFUL SALE OF PATENTED ARTICLE.

Where, by agreement, a sale by a manufacturer of a patented article is ratified and made lawful, the vendee of such article may lawfully resell, and there is no violation of the rights secured by the patent.

In Equity. On motion to dissolve restraining order.

W. B. H. Dowse and J. R. Bennett, for complainant.

O. M. Shaw and A. Hemenway, for respondents.

CARPENTER, J. This is a bill to restrain infringement of letters patent No. 161,591, dated April 6, 1875, and issued to Melvin B. Church, for "improvement in kalsomine," and letters patent No. 255,937, dated April 4, 1882, and issued to said Church for improvement in "plastic material." An application was heretofore made *ex parte* to Judge COLT for a restraining order. At the hearing before him there was evidence to show that the respondents, who are traders in Boston, sold in the market, on the eighteenth of January, 1886, a package of kalsomining compound, manufactured by the Anti-kalsomine Company of Michigan, and that the compound contained in the package was so made that the sale was an infringement of the claims of the above-stated letters patent. It was further shown that the complainant, in March, 1885, filed a bill in equity, in the circuit court for the Western district of Michigan, against the Anti-kalsomine Company and others, charging infringement of said letters patent No. 255,937, by the manufacture of the compound above referred to, in which suit a final decree was entered, by consent, on the seventeenth of October, 1885, perpetually enjoining the respondents, and granting other relief. On this state of the proof the restraining order was granted.

Motion is now made on affidavits to dissolve the restraining order, and this motion has been heard by me, at the request of Judge COLT, who is engaged in the hearing of other causes. At the hearing on this motion it was proved, on behalf of the respondents, and not denied by the complainant's proofs, that the package of kalsomine sold by the respondents, and whose sale constitutes the infringement charged in this bill, was sold and delivered by the Anti-kalsomine Company to the respondents on or before September 28, 1885; that is to say, before the entry of the final decree in the suit in Michigan. It also appeared that, at the same time with the entry of that decree, there was an agreement made by the complainant and the respondents in that suit, which provides as follows:

"The said Alabastine Company \* \* \* does herein and hereby release and discharge the parties above named, and each of them, from all claims for

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

profits and damages which might have been recovered by it in said cause; and does further release and discharge the parties above named, and each of them, from all claim for past damages, on account of a claimed past infringement of any of the parties described in the bill of complaint in the cause above referred to, and all claim for past damages by reason of past infringements of any of the letters patent mentioned in the said bill of complaint against persons, firms, or corporations who have heretofore purchased or sold goods of the said parties above named, manufactured and sold prior hereto, in violation of any of the said letters patent; and does covenant and agree to discontinue, within fifteen days hereafter, without prejudice or cost to either party, all suits heretofore commenced by it against all persons whomsoever on account of any alleged past infringements of any of the patents described or referred to in the bill of complaint in said cause; and also on account of having heretofore purchased goods of or dealt with the said defendants, or any of them, in the purchase and sale of goods heretofore manufactured and sold by said parties above named."

I think the effect of this agreement is to ratify and make lawful the sale of the package in question by the Anti-kalsomine Company to the respondents. If that sale is to be taken to be lawful, then it follows that the vendees might lawfully resell the goods, and there would be no violation of the rights of the complainant under the patent. The complainant, however, objects to this conclusion because of the following facts: It appears that, at the time the suit in Michigan was pending, there were also suits pending in other courts for infringements of the patents, by selling the infringing goods, and that one of these suits was against the respondents in this suit. It is further claimed that there was a general agreement for the compromise of the whole dispute, and the settlement of all the suits, and that to this general agreement the respondents were parties, and the complainant refers, for proof of this agreement, to the following words in the affidavit of the respondent Charles Richardson:

"I further depose and say that the package of anti-kalsomine sold by our said firm \* \* \* was a package that our firm had on hand at the time a certain compromise was entered into with the Alabastine Company, the Anti-kalsomine Company, Seeley Brothers, M. B. Church, and ourselves, by reason whereof our firm consented to the dismissal of a suit in equity, then pending between our said firm and the Alabastine Company, as appears on the records of the United States circuit court for Massachusetts."

Assuming it to be proved, then, that there was this general agreement, and that the release above recited was executed in pursuance of that agreement, the complainant contends that the true intent of that release was to discharge all claims for goods theretofore sold to persons who were not parties to the agreement, but that it was not intended to have the effect to validate sales theretofore made between the parties to the agreement in such manner that the goods so sold might lawfully be resold by the vendee. I do not think the transaction can bear this construction. I am not willing to say that, in consequence of the facts above recited, the respondents here are privies in interest to the release. But even if they are to be so considered, I do not think the words of the release are to be limited in

the manner claimed by the complainant. By that instrument the Alabastine Company released to the Anti-kalsomine Company all claims which they had against that company by reason of the manufacture and sale of the patented article, and also all claims which they had against all other persons who had purchased or sold the same article when manufactured by the Anti-kalsomine Company. This latter-named clause of the instrument, perhaps, does not operate as a release to these respondents, even if, as the complainant contends, the respondents are to be treated as if they were privies to that instrument; but it seems to me that the release amounts, at least, to an agreement that the purchase by the respondents, from the Anti-kalsomine Company, of the package in question, shall be taken to have been a lawful purchase. If, then, they purchased it lawfully, it follows that they became the lawful owners as against this complainant. I will not say that there might not be an agreement that the respondents should remain the lawful owners of the goods, and at the same time should remain liable to a suit for infringement if they used them or sold them to others; but the existence of an agreement of this character ought not to be found by means of inferences which are in any degree doubtful. It ought to be established by express words or by necessary implication. I find no evidence of such an agreement in this case. The restraining order, therefore, ought to be dissolved.

---

### HOLT v. KENDALL and others.<sup>1</sup>

(Circuit Court, N. D. Illinois. June 8, 1885.)

#### 1. PATENTS FOR INVENTIONS—INVALIDITY OF REISSUE.

Weymouth's reissued letters patent, No. 10,072, dated April 4, 1882, for an improvement in hay-knives, are void by reason of not being for the same invention specified in the original of March 7, 1871.

#### 2. SAME—CONSTRUCTION OF PATENT—DESCRIPTION OF THE INVENTION.

Where the general description of the nature of an invention, in the beginning of a specification, is not a description of the invention itself, it should be read in connection with the specific directions as to the manner in which the device to which it refers is to be made, and the peculiar characteristics which it is to possess.

In Equity.

*Jesse Cox, Jr., and B. F. Thurston*, for complainant.

*Fletcher & Wanty*, for defendants.

BLODGETT, J. This is a bill for an injunction and accounting by reason of the alleged infringement, by defendants, of reissued patent No. 10,072, dated April 4, 1882, issued to George F. Weymouth, as-

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

signor to complainant, for an "improvement in hay-knives," the original patent having been issued March 7, 1871.

The defenses set up are (1) that the reissued patent is void on the ground that the claims of the original patent have been unwarrantably expanded, and are for a different device than that described in the original; (2) that the original patent and the reissued patent are void for want of novelty; (3) that the defendants do not infringe.

In his specifications in the reissued patent, the patentee says: "My invention consists in a hay-knife containing the features of construction hereinafter set forth and claimed." He then proceeds to describe his hay-knife as a blade having one of its edges outwardly curved, upon which cutting projections are formed, which are sharpened on those edges nearest the blade point. This blade is provided with two handles, which are set off at one side of the blade at right angles to the edge, in such manner as that the hands of the operator will not strike against the sides of the mow as the blade is thrust into the mow when the knife is used; it being intended that the knife is to be thrust endwise into the mow or stack, and worked back and forth, or up and down longitudinally, like a saw, cutting in its forward or downward stroke, by the short knives or saw-like teeth set upon the outward edges of the blade. By reason of the curvature given to the blade, these cutting teeth form a stepped series of knives, so to speak, arranged upon the blade, and retreating, one behind the other, from the point to the heel of the blade; and the claim is:

"A hay-knife, the blade whereof is provided with suitable handles, and has an outwardly curved edge provided with serrations integral with the blade, and sharpened on their edges nearest to the blade-point, substantially as set forth."

It is admitted that the defendant manufactures and sells a hay-knife, the edge of which is indented or scalloped with a series of semi-oval notches, sharpened throughout their entire edges, so that the knife is equally adapted to cutting when being drawn upward or thrust downward; and the handles are placed at right angles to the edge of the blade.

The original device is described in the specifications as follows:

"My invention consists of a long, flat piece of steel, in the shape of a sword, excepting the handle, with little knives on one edge, from the handles to the point, the two handles standing out on one side, with which I thrust the knife perpendicularly into the hay, working it up and down, as I would a saw. \* \* \* I make my knife about one inch in width, and one-fourth of an inch in thickness at the handle, and quite thin at the point, and crooked edgewise, like a broadsword, with tooth-like knives, about an inch long on the outer edge or curve, their points inclining towards the point of the knife. \* \* \* The purpose of the inclination of the knife-teeth, or little knives, is that they may feed themselves."

And the claim of the original patent was for "the improved hay-knife, above described, consisting of the curved blade, A, having knife-

edged serrations, B, and handles, C, C, placed as shown, all substantially as specified."

It certainly does not require a very close criticism of the claim of the reissued patent to see that it is made to cover a device not covered by the original patent. The claim of the original patent certainly required that the points of the knife-edged serrations or teeth should incline downward, towards the point of the blade, and that the short or lower side of these teeth should form a slightly acute angle with the line of the blade. This form of constructing the teeth, and their relation to the line of the blade, is so clearly indicated by the drawings and model as to leave no doubt as to how the patentee intended to shape his blade, and the teeth upon the blade. The original claim also required the handles to be "placed as shown," and undoubtedly, under this requirement, the patentee was restricted to a knife with the handles placed as shown in his drawing and model, and it covered no other kind of knife; while the claim of the reissued patent allows the blade to be provided with "suitable handles," and simply requires that the curved edge shall be provided with serrations, but wholly omits any specific directions as to how the handles shall be placed, and any direction as to the shape of the serrations, or the direction of their points. There is no room for doubt that the claim of the reissued patent would cover a different knife from that covered by the claim of the original. Under the original patent only a knife with serrations of the particular shape shown and described was protected, while the reissued patent allows any shaped serrations, if they are only integral with the blade, that is formed by cutting or notching into the blade.

It was argued with much ingenuity upon the hearing that the original patent covered a knife like that manufactured by the defendant, because the patentee says: "My invention consists of a long, flat piece of steel, in the shape of a sword, excepting the handle, with little knives on the edge, from the handles to the point, and two handles standing out on one side." But this general description of the nature of his invention is not the description of the invention itself, as contained in the specifications further on, and which not only instruct the public how to make a knife like that invented by the patentee, but also give specific directions as to certain characteristics which the knife must possess, among which is that of requiring the points of the teeth to point towards the point of the blade; and the specific reason is given why these teeth should have this inclination. If only the original patent was now in force, it seems to me there could be no doubt that the defendants could manufacture and sell their hay-knife, with the notched or scalloped edge, with impunity, as the defendants' handles are not placed as shown in the original patent, and the points of the teeth do not incline towards the point of the blade. These limitations upon his invention in the original patent may have been uncalled for by the state of the art at the



time the original patent was issued, and the inventor may have unnecessarily limited the scope of his device by his description; but the proof shows that he was content with his patent as originally issued for upwards of 11 years, and only obtained this reissue after the defendants' knife had been brought upon the market, and become a dangerous competitor.

If the essential feature of Weymouth's invention was the notched blade, and by a reissue complainant could cover a blade with teeth or serrations of any shape, he might also, with equal propriety, have covered any shaped blade, and could yet reissue so as to cover a straight blade. It therefore seems to me that this reissue comes clearly within the late cases in the supreme court holding that a patent cannot be reissued with expanded claims, unless it is done within two years from the date of the original patent. *Mahn v. Harwood*, 112 U. S. 354; S. C. 5 Sup. Ct. Rep. 174; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624; S. C. 5 Sup. Ct. Rep. 475; *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659; S. C. 5 Sup. Ct. Rep. 501.

Without examining, then, or definitely passing upon the question of novelty raised in the pleadings and proof, it is sufficient to say that I feel compelled, under the authorities and testimony in the case, to hold this reissue void, upon the ground that by it the original patent has been unduly expanded and enlarged.

The bill is dismissed for want of equity.

---

### HAINES v. PECK and another.<sup>1</sup>

(Circuit Court, S. D. New York. February 18, 1886.)

#### 1. PATENTS FOR INVENTIONS—VOID REISSUE.

Reissued letters patent No. 4,361, of May 2, 1871, to John P. Haines, for improvement in oil-cups, are void because for a different invention from the original, No. 92,820, of July 20, 1869.

#### 2. SAME—EXCUSE FOR DELAY IN APPLYING FOR REISSUE.

The excuse that patentee was ignorant of the laws pertaining to letters patent is wholly insufficient.

On Demurrer.

*Fredric H. Betts*, for complainant.

*Charles E. Mitchell* and *Morris W. Seymour*, for defendants.

COXE, J. The complainant is the inventor of an improvement in oil-cups, for which letters patent No. 92,820 were granted July 20, 1869, and reissued, No. 4,361, May 2, 1871, 21½ months thereafter. The application for the reissue was filed in January, 1871. The de-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

fendants demur to the bill on the following grounds: *First*, departure from the original invention; *second*, unlawful expansion of the claims; *third*, want of novelty, in view of prior devices, of which the court will take judicial knowledge.

In the original the inventor declares:

"The invention consists in providing the shank of the nozzle with a left-hand screw-thread, by which it is secured to the body of the can, and with a right-hand screw-thread to receive the nozzle-covering cap, so that when the cap is removed, there will be no danger of also unscrewing the nozzle."

These words are not found in the reissue. On the contrary, he there asserts that his invention consists:

"*First*, in an article made up of three parts never before combined in an oil-can. It consists, *secondly*, in a peculiar construction of the body to render it smooth, pliable, and not irksome to the person of the party carrying it."

The claims of the original and reissue are here placed side by side. The italics in each show the matter not found in the other:

## ORIGINAL.

"As a *new* article of manufacture, the pocket oil-can, *when the shank, a, of its nozzle, B, is provided with the left-hand screw-thread fitting into a corresponding female screw-thread in the mouth of the body, A, and with a right-hand screw-thread, b, adapted to receive the cap, C, in which a similar female screw-thread is formed, all operating as described, for the purpose specified.*"

## REISSUE.

"1. As an article of manufacture, a pocket oil-can, *formed of a round body, A, nozzle, B, and cap, C, combined as described.*

"2. *In an oil-can adapted to be carried in the pocket, a body, A, formed of thin elastic metal rounded into an oval form, and having its sides held apart by an inner spring, as specified.*"

It will be observed that in the original the claim is for an oil-can provided with a nozzle, having a left-hand screw-thread, and a cover or cap having a right-hand screw-thread, so that the unscrewing of the cap will not tend to remove the nozzle also. In other words, the original invention was confined, both in the description and the claim, to the reverse screw-threads of the nozzle and the cap. The original claimed the screw-threads and nothing else. The reissue claims everything but the screw-threads.

No one would infringe the original who did not use the right and left hand screw-threads. On the contrary, any one using a round-bodied pocket oil-can, with a nozzle and a cap, would infringe the first claim of the reissue, no matter how the nozzle was fastened to the can, or the cap to the nozzle. A can that would infringe the original would not infringe the reissue, and a can that would infringe the reissue would not infringe the original. They relate to essentially different devices. The original is as silent as to the inner spring, the thin elastic metal, the oval form, and the combination of the round body, the nozzle, and the cap, as the reissue is as to the reversed screw-threads. In *Russell v. Dodge*, 93 U. S. 460, the court say:

"And, as a reissue could only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to change the scope of the invention as originally claimed."

The specification here is open to both criticisms,—new matter has been added and important particulars omitted. If the inventor had entertained the same idea of the scope and character of his invention in July, 1869, that he did in May, 1871, it is hardly possible that he could have been so unfortunate in making himself understood. No man of ordinary intelligence would retain for 18 months a patent which describes and claims a device bearing hardly a trace of resemblance to his invention. There is no escape from the conclusion that the three-part oil-can was an after-thought; that the object of the patentee in 1871 was to obtain a patent for a different invention from the one described and claimed by him in 1869.

Regarding the second ground of demurrer it may be said that the moment the patentee opened his patent he saw that, both in the description and the claim, he had limited his invention to the screw-threads. It was then his duty to act. It was not a case of an involved or intricate description. If there was a mistake, the veriest tyro in invention must have perceived it. The excuse advanced by the complainant, that he did not discover his error because he was ignorant of the laws pertaining to letters patent, is wholly insufficient. The case cannot be distinguished from *Wollensak v. Reiher*, 115 U. S. 96, S. C. 5 Sup. Ct. Rep. 1137, and the other decisions of the supreme court since January, 1882.

The demurrer is sustained.

### KNAPP v. BENEDICT and another.<sup>1</sup>

(Circuit Court, D. Connecticut. February 12, 1886.)

#### 1. PATENTS FOR INVENTIONS—INFRINGEMENT.

To a bill for infringement of letters patent No. 189,233, of April 8, 1877, to Henry F. Knapp, for means for relieving stranded vessels, the only defense was non-infringement. The defendant had used the same methods for relieving a vessel, which had been in frequent use since 1860 for removing sandy obstructions, and therefore held that he did not infringe.

#### 2. SAME—JUDICIAL NOTICE.

The court is permitted to avail itself of common knowledge in regard to matters of science, (*Brown v. Piper*, 91 U. S. 37,) and by that knowledge to define the scope of a patent.

In Equity.

Edwin H. Brown, for plaintiff.

Rufus S. Pickett, for defendants.

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement of letters patent No. 189,233, granted to the complainant, April 3, 1877, for an improvement in means for relieving stranded vessels. The only defense which is set up in the answer is non-infringement.

The invention is thus described in the specification of the patent:

"This invention consists in certain novel means of manipulating a stranded vessel, so that she may be relieved with facility; and consists in introducing within her hold one or more main tubes, which are tapped at intervals by small pipes, that are made to pass out through small apertures in the bottom of the vessel on either or both sides of the keel, and are fitted air or water tight for the purpose of forcing water through the entire arrangement of pipes, so as to soften the sand, as well as to lubricate the contact or friction of the sand or mud against the outside skin of the vessel, and thus enable her to move more readily by means of warping-lines. As vessels that run ashore on sandy coasts are rapidly 'banked up' with sand by reason of the peculiar action of the sea, it is an important feature of this invention that such banking up can be largely avoided, as well as reduced, by the means herein described; also the running action of the sea will, at times, cut away the sand, etc., from under a portion of a stranded vessel, leaving her to rest on an uneven foundation, which causes her to not only strain badly, but to frequently be the cause of her breaking to pieces. This result I propose to avoid by softening and washing or blowing away the sand from under that part of the vessel that is not already cut away by the action of the sea, so as to secure an even foundation and bottom for her along her whole length. Again, vessels that go ashore on sandy beaches most frequently take a position broadside to the sea, and, as their flotation is facilitated by getting them end to the sea, this may be accomplished by ejecting the fluid into the sand, under the starboard side forward, and port side aft, or *vice versa*, according to the circumstances of her position, all in order that she may be gradually slewed around, as desired."

The first claim is as follows:

"(1) The process herein described of relieving stranded vessels, by causing them to float in a fluid or semi-fluid, by means of forcing continuous streams of fluid, immediately around its bottom, into the sand or mud in which the vessel is embedded or lies, for the purpose of washing away and softening the sand, while at the same time a lateral movement or strain is imparted to the vessel by means of warping-lines or equivalent means, whereby it may be moved into deeper water, substantially as and for the purpose set forth."

On January 9, 1884, the Robert Morgan, a new schooner of 552 tons, which was commanded by the defendant Crossley, went ashore, broadside, on the beach at Atlantic City. A contract was made with a wrecking company to put the vessel afloat, and operations to that end commenced about the middle of February, which, prior to May 24th, resulted in slewing the schooner around with her stern towards the ocean. The captain thought that there was wreckage or some hard substance under the vessel which prevented her progress. He had seen on the beach at Atlantic City, the sinking of piling or posts by the aid of a stream of water forced into the sand at the bottom of the post, and had also been shown by the managers of the water-works company the effect of a stream of water upon sand, and he thought that the obstruction could be removed or sunk in the sand

as the result of a similar plentiful injection of water through a nozzle under the vessel. He therefore contracted with the Atlantic City Water-works Company to lay pipes and hose to the schooner, and to furnish him water through the pipes. The ends of these pipes were thrust into the sand under the vessel, to the depth of seven or eight feet, and water was let into the hose from the city hydrant for four days from May 24th to May 27th. The consequence was that the sand under the vessel was in a semi-fluid state, the vessel sank some feet, and if there was any wreckage it disappeared. The use of the water was objected to by the wrecking company, and was discontinued. On May 24th the log-book says that the sand was cut out about 30 feet, and the vessel was moved nine inches. The log of May 26th says as follows:

"8 P. M. Vessel started to roll, rolling slightly for about an hour, and for the first time since she came ashore. Rolling caused by the three streams of water amid-ships. \* \* \* Moved altogether this tide 15 feet."

On June 11th the vessel was got off from the beach.

As the court is permitted to avail itself of common knowledge in regard to matters of science, (*Brown v. Piper*, 91 U. S. 37,) and by that knowledge of the state of the art to define the scope of the patent, such knowledge in regard to the use of a jet of water through a pipe and nozzle, for the purpose of lowering piles into sandy foundations, and of removing sandy obstructions, shows that the defendant did nothing except what had been in frequent use since 1860, and did not infringe the patent.

The bill is dismissed.

---

MARCHAND v. EMKEN.<sup>1</sup>

(Circuit Court, S. D. New York. February 18, 1886.)

1. PATENTS FOR INVENTIONS—MANUFACTURE OF HYDROGEN PEROXIDE.

The first claim of letters patent No. 273,569, of March 6, 1883, for an improvement in the manufacture of hydrogen peroxide, is void for want of patentable novelty.

2. SAME—SUBSTITUTION OF MACHINE FOR HAND POWER.

It does not constitute invention to stir, by a well-known and simple mechanical device, a liquid which had before been stirred by hand; and hence the mere substitution of a revolving screw, driven from a power shaft, for paddles operated by hand, for stirring such liquid, is not patentable.

In Equity.

*B. F. Lee* and *W. H. L. Lee*, for complainant.

*Marshall P. Stafford*, for defendant.

*COXE, J.* The complainant is the owner of letters patent No. 273,-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

569, granted March 6, 1883, for an improvement in the manufacture of hydrogen peroxide.

The claim in controversy is as follows:

"(1) The method of making hydrogen peroxide by cooling the acid solution, imparting thereto a continuous movement of rotation, as well in vertical as in horizontal planes,—such, for example, as imparted by a revolving screw in a receptacle,—and adding to said acid solution the binoxide in small quantities, while maintaining the low temperature, and the rotary or eddying movements, substantially as described."

The defenses are lack of novelty and invention, and non-infringement.

The invention, as stated in the specification, relates to the manufacture of hydrogen peroxide, or oxygenated water, by the addition of barium, mixed with water, to an acid; and it consists in imparting to the acid a movement of rotation, the time required for chemical reaction being thereby lessened, while the reaction itself is more complete. To effectuate this purpose the specification describes and the drawing illustrates an apparatus consisting of a caldron surrounded by a jacketing vessel which contains the cooling medium, and an automatic stirrer provided with helicoidal blades, and suspended so as to revolve near the bottom of the kettle. The claim is for this process of making hydrogen peroxide. The application was three times rejected, and was finally allowed by the examiners-in-chief in a qualified form, upon the theory that there was, as to this particular liquid, something magical in the motion imparted by a screw. It is not pretended that the complainant discovered hydrogen peroxide, or the method of adding barium mixed with water, from time to time, to the diluted acid, or the necessity for stirring or agitating the liquid. Neither did he invent the obliquely bladed screw, the hemispherical receptacle, the jacketing vessel, or any part of the apparatus described in the specification. All this was old and well known. The patent itself illustrates how extremely circumscribed was the theater of invention. This is demonstrated by placing side by side two statements taken from the specification, the first describing the prior process, and the second the patented process.

"Heretofore hydrogen peroxide has been made by adding the barium or calcium binoxide, mixed with water, to the diluted acid; the binoxide being added from time to time in small quantities, the vessel in which the operation is conducted being set in a refrigerating medium, and the liquid being agitated or stirred to facilitate the reaction. The stirring has been performed by hand."

"The [jacketing] vessel, B, being filled with the cooling medium, the proper quantities of acid and water are placed in the receptacle, A. The screw, C, is put in motion, and the binoxide of barium or calcium, in the state of a more or less thick emulsion or milk, is added in small quantities. The revolving screw imparts a movement of rotation more or less rapid to the liquid, producing eddies therein, and constantly changing the material, and the chemical reaction takes place very regularly and completely."

If the word "machinery" were substituted for the word "hand" at the end of the first quotation, the description of the old method would answer as well for the new. The question, then, seems to be narrowed down to this: Does it constitute invention to stir by a well known and simple mechanical device what had before been stirred by hand? The complainant desired to manufacture in large quantities what had before been produced chiefly in the laboratory. He knew how hydrogen peroxide had been made,—every step in the formula was familiar. A mixture that needed stirring and a vessel provided with a revolving stirrer were ready at his hand. He put the former into the latter. This was all. The object of agitating the liquid, while making hydrogen peroxide, is to keep the barium, which is three times as heavy as water, suspended in the acid, so that its particles may come in contact with the particles of acid. Whether they come in contact while going round, rising, settling, or remaining stationary can make no difference. Divest the case of the air of mystery with which it is environed, and it seems simple enough. The complainant's predecessors knew that to keep the barium up in the solution they must stir it. The complainant knew this. Unlike them, however, he manufactured on a scale large enough to make it essential to employ a power shaft. The oar-shaped sticks which formerly went round and round by hand now go round and round by machinery.

Perhaps the clearest statement of the invention, from complainant's standing-point, is found in the evidence of the witness Hedrick. He says:

"The method \* \* \* set out in the complainant's patent \* \* \* is based upon reactions well known in the art, and discovered by Thenard. \* \* \* The dilute acid is given a movement which has never before been imparted to it in the manufacture of hydrogen peroxide, and which the patentee claims as new in that art. \* \* \* The liquid is thrown out towards the circumference of the vessel at the bottom, rises at the sides, returns to the center, and then descends, to be again thrown out at the bottom, while at the same time it is carried round and round."

Which, being reduced to still simpler language, means that the machine will stir large quantities of the liquid more thoroughly than the hand-worked paddles. He who wishes the sugar and cream which he puts into his coffee to be diffused uniformly through the mixture is quite likely to stir it with a spoon. Should the same individual have occasion to provide coffee for a regiment of soldiers, he might, to save time and labor, place it in a kettle provided with a stirrer like complainant's, but to found upon such action a claim for a new process of making coffee would probably be thought absurd.

The pretense that the complainant has discovered some occult and wonder-working power in the motion of a screw revolving in the bottom of a tub is not sustained by the proof. Whether the contents of the tub be oxygenated water or soap or lye or tartaric acid, the action will be the same. That rotary, eddying motions in liquid will result from the revolving screw; that the liquid will rise highest at the

periphery of the tub, and thus have the tendency, at the top, to fall towards the center,—were well-understood operations of centrifugal force.

As every device, apparatus, formula, law of nature, motion, and ingredient adopted by the complainant was old, the patent must be held invalid, unless it can be said that giving to oxygenated water a well-known rotary motion springs "from that intuitive faculty of the mind, put forth in the search of new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision." No such faculty has been tasked in giving form to this patent. There is here no sufficient foundation upon which to rest a claim which, if construed as broadly as the complainant insists it should be, practically makes all pay tribute who stir the mixture in question by machinery; and by hand also, provided substantially the same movement can be produced by hand stirring,—and this seems to be a disputed question upon the proof. The complainant's claim to be enrolled upon the list of inventors is based upon propositions too theoretical and visionary for acceptance. He has but caught a bubble from "the advancing wave of improvement."

As the foregoing considerations must dispose of the cause, it is deemed unnecessary to consider the question of infringement. It would seem, however, in view of the fact that the claim, if upheld at all, must be confined within exceedingly narrow limits, that grave difficulties confront the complainant upon this branch of the case. The defendant uses a tub in which revolves a shaft, set with flat blades, at right angles to the shaft. The only action of the stirrer is to make the liquid go round and round. In order to produce violent agitation, he projects, from a vertical cleat fastened to the side of the tub, two horizontal boards extending nearly to the center. As the shaft revolves, the lower blades pass under the lower board, and the upper blades pass between the boards. It would seem doubtful, at least, whether the motion thus produced is at all analogous to that described in the patent. It is difficult to discover that which the examiners aptly liken to the movement of the smoke ring. It can hardly be said that there is a "ring vortex" in defendant's tub.

The bill is dismissed.



BOLAND v. THOMPSON.<sup>1</sup>

(Circuit Court, S. D. New York. February 18, 1886.)

## 1. PATENTS FOR INVENTIONS—VOID REISSUE.

The first claim of reissued letters patent No. 9,586, granted to Claude N. Boland, February 22, 1881, for an improvement in glove sewing machines, is void; such claim not being found in the original, the application having been filed two years, two months, and eight days from the date of the original, and the rights of the public having intervened.

## 2. SAME—EXCUSE FOR DELAY IN APPLYING FOR REISSUE.

The patentee was a foreigner, unfamiliar with the English language, and was ignorant that the claim in controversy had been omitted from the original patent until a fortnight before the application for the reissue. *Held*, that these facts were not sufficient to excuse the delay.

## 3. SAME—RIGHTS OF THE PUBLIC—DUTY OF THE COURTS.

To every patent the public is an indirect party. It is for the advantage of the whole people that all meritorious inventions shall be protected; but it is clearly the duty of the courts to see to it that the public is not required to pay tribute for that which may be fairly considered as abandoned by the inventor.

## 4. SAME—REMEDY FOR REJECTION BY PATENT-OFFICE, APPEAL, NOT REISSUE.

The claim in controversy was presented in the original application and twice rejected. The applicant knew of the rejection, and his solicitors acquiesced in such ruling. *Held*, that the proper course to secure the claim was to appeal, and that there was no such inadvertence, accident, or mistake as entitled the patentee to a reissue.

## In Equity.

James A. Whitney, for complainant.

W. H. L. Lee and B. F. Lee, for defendant.

COXE, J. This is an equity action founded upon reissued letters patent No. 9,586, granted to Claude M. Boland, February 22, 1881, for an improvement in glove sewing machines. The original letters patent, No. 202,695, were dated April 23, 1878. The application for the reissue was filed July 1, 1880, two years, two months, and eight days from the date of the original. The invention consists in substituting, as a support for the outer feed disk, a bent arm, projecting from the upper part of the casing of the machine, for the upright or curved column resting upon the extended base of the casing; the advantage being that a free space is thus left beneath the disks, permitting material of any size to be sewed upon the machine. The original contained four claims. The reissue contains five. The four claims of the original are substantially repeated in the reissue, and a new one added. It is this new claim, the first of the reissue, which alone is in controversy. It is in the following words:

"(1) In a sewing-machine, the combination of two feed disks, D, D<sup>1</sup>, arranged in horizontal position and in contact, and a bent arm, D<sup>2</sup>, which suspends and serves as a journal for the outer disk, whereby a free space is left beneath the latter, as shown and described."

The specification attached to the original application, filed by the inventor, September 22, 1877, contained a claim similar to the one just quoted. It is in these words:

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

"(1) In a glove sewing machine, the combination of an intermittently revolving feed-disk, with a second feed-disk, forming frictional contact therewith, and turning on the end of a curved supporting arm arranged, above the feed-disks, to leave a free space below the same, substantially as and for the purpose set forth."

This claim was rejected by the examiner on the fifteenth of November, 1877, upon reference to the Polmateer patent of November 23, 1875; and a few days thereafter it was amended, and again presented as follows:

"(1) The feed-disks, D, D<sup>1</sup>, arranged with respect to the remainder of machine, and their curved support, D<sup>2</sup>, to leave a subjacent space for handling the work, as shown and described."

The claim, as amended, was again rejected on the twentieth of November, 1877, the reference being the same. The complainant knew of the action of the examiner in this respect, and wrote to his solicitors on the seventh of December, 1877, reiterating the demand that the first claim referred to should be retained. He also had frequent consultations with them through an interpreter. The first claim of the reissue had therefore been the matter of discussion between the complainant and his solicitors, and between the solicitors and the officials of the patent-office. It had been deliberately rejected, and the ruling was acquiesced in by the solicitors, December 14, 1877. In the spring of 1880 the defendant commenced the sale of the infringing machines. Besides the defendant's, other rights intervened; the arrangement of the feed-disks being shown in English and American letters patent granted to Wollenberg and Priesner, the latter being dated August 6, 1878. The complainant, on discovering that he could not maintain a suit against the defendant upon his original patent, promptly applied for a reissue.

Upon these facts, can the reissue be sustained? The impression obtained on the argument was that the complainant had made a meritorious invention, and the record has been examined with care to discover, if possible, some theory upon which the patent can be lawfully upheld; but it is thought that there is no way of fairly distinguishing the case in hand from the well-known adjudications upon this subject. No proposition can be advanced in support of the reissue that does not find an apt and ready answer in the language of the courts. Every avenue of escape is closed. Among many authorities, the following have been selected as particularly applicable and decisive of the questions involved: *Wollensak v. Reiher*, 115 U. S. 96; S. C. 5 Sup. Ct. Rep. 1137; *Coon v. Wilson*, 113 U. S. 268; S. C. 5 Sup. Ct. Rep. 537; *Mahn v. Harwood*, 112 U. S. 355; S. C. 5 Sup. Ct. Rep. 174; *Leggett v. Avery*, 101 U. S. 256; *Miller v. Brass Co.*, 104 U. S. 350; *New York Belting & Packing Co. v. Sibley*, 15 Fed. Rep. 386; *Arnheim v. Finster*, 24 Fed. Rep. 276; *In re Hatchman*, 26 O. G. 738.

Great stress is laid upon the fact that the complainant is a Frenchman, and unfamiliar with the English language. He was, it is said,

ignorant that the claim in dispute had been finally omitted until a fortnight before the application for the reissue. Should such excuses be accepted by the courts? These questions must be determined upon broad and general principles. The march of the law cannot be arrested or diverted from the broad and traveled highway, to deal specially with each isolated and peculiar transaction. No two cases are precisely similar, and the rule should not be changed because of slight variations upon the facts. Ignorance of domestic law is never an excuse, nor is ignorance of fact, when it is traceable to the culpable negligence of the party who seeks relief. Were it otherwise; inadvertence and mistake would be synonymous with willful and intentional neglect. To hold that the complainant's failure to understand our language exonerates him, would lead logically to the conclusion that a patent might legally be reissued to a foreigner which would be held invalid if reissued, in like circumstances, to an American. There was enough in this case—far more than ordinarily appears—to put the complainant on his guard; to induce him, at least, to have his patent read, and, if need be, explained, in order that he might ascertain the full extent of the government grant to him: Instead of pursuing this obviously prudent course, he waited supinely for over two years, and now, when other rights have intervened, he answers the charge of laches by saying that he did not know what his patent contained. The law will not permit him to do this. To every patent the public is an indirect party. It is for the advantage of the whole people that all meritorious inventions shall be protected, but it is clearly the duty of the courts to see to it that the public is not required to pay tribute for that which may be fairly considered as abandoned by the inventor.

But, irrespective of the question of laches, *Leggett v. Avery*, *Arnheim v. Finster*, *In re Hatchman*, *New York Belting & Packing Co. v. Sibley*, *Mahn v. Harwood*, *supra*, and *Shepard v. Carrigan*, 6 Sup. Ct. Rep. 493, (Sup. Court, February 1, 1886,) are authorities for the proposition that when a claim has been examined and rejected by the commissioner, the rejection acquiesced in by the patentee, or his solicitor, and the patent reissued without the claim, there is no inadvertence, accident, or mistake which entitles the patentee to a reissue. His remedy is by appeal.

The bill is dismissed.

HUDNUT v. LAFAYETTE HOMINY MILLS and others.<sup>1</sup>*(Circuit Court, D. Indiana. February 22, 1886.)*

## 1. PATENTS FOR INVENTIONS—HOMINY MILLS.

In a suit on reissued letters patent No. 10,057, of March 7, 1882, to Theodore Hudnut, it was shown that one of the alleged infringing machines was made in accordance with an earlier patent, and therefore *held* that such machine was not an infringement.

## 2. SAME—REISSUE WITH ENLARGED CLAIMS.

It is not competent for a patentee, by a reissue of his patent, procured after a delay of more than 10 years, to so enlarge the scope of his invention as to cover devices, patented in the mean while, which were not embraced in the original.

In Equity.

*C. P. Jacobs*, for complainant.

*McDonald, Butler & Mason*, for defendants.

WOODS, J. Suit for infringement of reissued letters patent No. 10,057, issued to the complainant, for an improvement in hominy mills, March 7, 1882. Besides denying the novelty of the complainant's invention and the validity of his reissued letters, the defendants also deny infringement.

There are two machines, somewhat different from each other, which the defendants are shown to have made or used, and which constitute the alleged infringements. One of these is known in the record of the case as the "Sinker-Davis Machine," and the other as the "Burns Machine." The first-named machine, in the particulars in which infringement is alleged, is made in substantial conformity with letters patent No. 57,605, dated August 28, 1866, issued to J. A. Welsh, and therefore cannot be regarded as an infringement of complainant's patent, which was issued some years later. The other machines in question are shown to have been made in conformity with letters patent No. 247,882, issued to Edward R. Burns, and dated October 4, 1881. This date is earlier than that of the reissued letters sued upon, but later than the dates of complainant's original letters and the first reissue; the original letters being dated December 26, 1871, and the first reissue, (numbered 5,520,) bearing date March 22, 1873.

Now, conceding their validity as inventions, it seems to me quite evident that the Burns patent, or a machine made under it, does not infringe any claim, either of the original letters of the complainant or of the first reissue, because the combination specified in each claim thereof included the "arms, I," which are not found in the Burns device. The third and fourth claims of the second reissue, however, omit all express reference to the "arms, I," and the question arises whether or not these claims are valid, and have been infringed by the defendants.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

By the dates already given, it appears that this reissue was taken more than ten years after the date of the original letters, and nearly nine years after the date of the first reissue, and some months after the granting of the Burns patent. The complainant's original invention and first reissue, as I construe them, not only embraced in every claim the "arms, I," but, by force of the specifications, were confined to a particular mode of adjustment; that is to say:

"The cutters, which consist of steel plates, G, with the inner point of the cutting edges, H, projecting over a true circle struck from the axis of the shaft, are bolted to the arms, I, between them, and these arms are bolted to the lugs, F, on the plates, being laid across said plates tangentially," etc.

And in the first reissue it was added that "these holders [arms, I] constitute part of the cutters, and act, by reason of their curved shape, very effectively, in connection with the stationary cutters of the case, in cutting or breaking grain." Other effects and benefits of this adjustment are shown in evidence. Besides omitting the arms or holders entirely, the knives in the Burns device were so shaped, and fastened directly to the lugs in such manner, as to accomplish, in some particulars, directly opposite results or effects to those of the complainant's machine.

Upon this state of facts, I do not think it was competent for the complainant, by a second reissue of his patent, procured after so long a delay, to so enlarge the scope of his invention as to cover devices, patented in the mean while, which were not embraced in the original letters.

Bill dismissed for want of equity.

---

### THE LOTUS No. 2.<sup>1</sup>

#### WALKER and others v. THE LOTUS No. 2.

(*District Court, S. D. Alabama. January 27, 1886.*)

#### 1. SHIPS AND SHIPPING—HOME PORT—ENROLLMENT OF VESSEL.

The word "port," as used in the system of laws relating to the importation of merchandise, has a restricted meaning, and is applicable only to a place for the collection of duties on imports; but when not so used, it has a wider and an entirely different meaning.

#### 2. SAME—"HOME PORT" DEFINED.

In the latter sense it means, not a port of entry only, but may mean also the place of residence of the owner. The "home port" of a vessel, therefore, may be a port of entry, or it may be a port or place other than a port of entry.

#### 3. SAME—VESSEL, WHERE ENROLLED.

The location of the custom-house determines the place of enrollment; but when the place of enrollment and of residence of the owners of the vessel

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

differ, the latter will be considered the "home port," even though the place of enrollment is in another state, if the facts of ownership and residence were known or might have been known to the material-man.

**In Admiralty.**

*George M. Duskin and H. T. Toulmin*, for libelants.

*J. T. Overall and D. P. Bestor*, for mortgagees.

BRUCE J. We are met at the threshold of this case with the question, what was the home port of the vessel the *Lotus No. 2*? She was owned by the Columbus Packet Company, a corporation organized under the laws of the state of Mississippi, with its place of business at Columbus, in that state. This company executed to the Columbus Insurance & Banking Company, of that place, a mortgage upon the vessel to secure a debt which had been contracted to put new machinery and repairs upon the vessel. The mortgage bears date April 12, 1884, and it was received for record in the collector's office, custom-house, Mobile, April 14, 1884. The vessel was enrolled in the custom-house, Mobile, and bill of sale from John Doyle of Columbus, Mississippi, to the Columbus Packet Company was received for record, custom-house, Mobile, July 6, 1883. After the execution and record of the mortgage, the vessel continued to be engaged as a carrier of freight and passengers, navigating the rivers between the cities of Mobile, Alabama, and Columbus, Mississippi, and, while at the port of Mobile, certain parties, in the regular course of trade, and at the request of the master of the steam-boat or other agent, furnished the steam-boat with certain supplies, a statement of which accompanies the libels, and it is alleged that the supplies were necessary for the furnishing and fitting of said steam-boat to enable her to perform her voyage or voyages, and were founded on the credit of the steam-boat, and that these bills have not been paid. There are a number of these claims for which the steam-boat was libeled in this court, June 3, 1885. The vessel was sold under the order of the court, and the question arises in the case upon exceptions filed to the report of the clerk of the court, to whom the case was referred, raising the question of the priority of claims upon the fund in the registry of the court. The mortgagees, the Columbus Insurance & Banking Company, claim that they shall be paid next after the payment of the claims which are strictly maritime, about which no question is made, and the parties who furnished the steam-boat with supplies here in Mobile claim that they are entitled to priority of payment, notwithstanding the fact that these claims accrued after the execution and record of the mortgage in the custom-house at the port of Mobile. The claim of priority of payment on the part of the mortgagees is based upon the proposition that the port of Mobile is the home port of the *Lotus No. 2*, and that, therefore, the supplies were furnished, not on the credit of the vessel, but on the credit of her owners, and therefore they, the mortgagees, are entitled to priority of payment. The question, then, is, where was the home port of this vessel, and

how or by what rule is the home port of a vessel to be defined and determined?

The words themselves, "home port," indicate that it is where she belongs or is owned. The statutes, and decisions of courts, on the subject speak of where she belongs, sometimes where she is built, where she is enrolled and licensed, and perhaps more often where her owners reside. It is claimed here that the home port of the vessel in question, the Lotus No. 2, was Columbus, Mississippi, because she was owned there by a company incorporated under the laws of the state of Mississippi; that the stockholders of that company resided there; and that the vessel had, in compliance with an act of congress, the words "The Lotus No. 2, of Columbus, Miss.," painted upon her stern. It is claimed, however, that in legal contemplation, and under the laws of congress upon the subject of the registration and enrollment of vessels, that Mobile was her home port, for that she was enrolled there in the office of the collector of customs of that port, and that Columbus, Mississippi, is within the collection district of which Mobile is the port of entry. Section 4141 of the Revised Statutes of the United States provides:

"Every vessel, except as hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

The law as to the enrollment of vessels is the same under section 4312 of the Revised Statutes of the United States as it is in reference to the registry of vessels, and it is not questioned that the Lotus No. 2 was properly enrolled in the office of the collector of customs of the port of Mobile. The statute, however, is in relation to the registry (enrollment, in this case) of vessels, and provides where such registry or enrollment shall be made; but it certainly does not provide, in words at least, that the place where such registry and enrollment shall be made is by that single test to be held and deemed her home port. The words of the statute seem to imply that the port to which the vessel shall belong at the time of her registry may be other than the port at which she is to be registered or enrolled, and the port at which she is to be registered or enrolled is to be deemed to be that at or nearest to which the owner of such vessel usually resides.

It is said Columbus, in the state of Mississippi, is not a port at all, because it is not a port established by law for the entry of merchandise through a custom-house, and the proposition is that in contemplation of law only such port where a custom-house is located can be the home port of a vessel. In the system of laws enacted by congress concerning the subject of the importation of merchandise to be entered in custom-houses established by law, the word "port" has a statutory definition, and section 2767 of the Revised Statutes of the

United States, tit. 24, c. 4, under the head of "Entry of Merchandise," provides: "The word 'port,' as used in this title, may include any place from which merchandise can be shipped for importation, or at which merchandise can be imported;" so that when the word "port" is used in the statute as to the importation of merchandise, it means a place for such importation, but when not so used, it may have and does have a wider and more general signification.

Can it be maintained that the word "port," as used and defined by congress in title 34, which is in reference to the collection of duties on imports, and chapter 4 under that title, which is as to the entry of merchandise, must be held to have been used in the same restricted sense in title 48, which is in reference to the regulation of commerce and navigation, and chapter 1 under that title, as to the registry and recording of vessels? The two subjects are separate and distinct,—so treated in the statutes of the United States,—and while the word "port" has a restricted meaning in reference to the entry of merchandise for the collection of duties on imports, for a manifest reason, can it be held that it has the same restricted meaning in reference to an entirely different subject, the registry of vessels, the vehicles of commerce? In the former case it means a port of entry; in the latter, it is used in a general sense; and congress has not changed the law of the admiralty, that the home port of a vessel is the port or the place where she belongs and where her owners reside. The act of congress of June 26, 1884, known as the "Dingley Bill," throws some light on the subject. Section 21 provides that the word "port," as used in sections 4178 and 4334 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered, or the place in the same district where the vessel was built, or where one or more of her owners reside. The conclusion seems clear that the word "port," in the statute under consideration, is not to be held to mean a port of entry only, but may mean the place where the owners of the vessel reside; and the home port of a vessel may be a port of entry, or it may be a port or place other than a port of entry.

It is claimed that the supreme court of the United States has settled this question in the case of *Morgan v. Parham*, 16 Wall. 476. In that case the court said:

"It is the opinion of the court that the state of Alabama [for it was a case from this court] had no jurisdiction over that vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of the state, but was there temporarily only, and that it was engaged in lawful commerce between the states, with its *situs* at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value."

There was no question arising in that case such as there is here, for there the vessel belonged and her owners resided at the port of



New York, where she was registered, and which was therefore her home port; and, while there are expressions in the opinion which might seem to imply that the place of registry is always to be deemed the home port of the vessel, yet that was not the point decided, and the court does not overrule or modify the former case of *St. Louis v. Ferry Co.*, 11 Wall. 431, which is more in point, where the court say:

"The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, § 2, and the act of 1792, § 3, require every vessel to be registered in the district to which she belongs, and the fourth section of the former act, and the third section of the latter, declare that her home port shall be that at or near which her owner resides. The solution of the question where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment."

In both of these cases the question was, where is a vessel, engaged in commerce, liable to taxation under state and municipal authority? And the court hold that it is not where she may have been enrolled, and in the former case the court, at page 476 of the opinion, say:

"There was nothing in her enrollment in the port of Mobile that affected her registry in New York, or her ownership in that place, or that tended to subject her to the taxation of the state of Alabama."

These cases are certainly not conclusive of the proposition in support of which they are cited, if, indeed, they do not support the contrary doctrine.

In the case of *The Jennie B. Gilkey*, (circuit court, D. Massachusetts,) 19 Fed. Rep. 127, LOWELL, J., says: "It has often been decided that the place of residence of the owners is to be considered the home port, even when the registration is in another state, if the facts of ownership and residence were known or might have been known to the material-men;" citing authorities. The same view is taken by Judge Brown, of the Southern district of New York, in the case of *The Charlotte Vanderbilt*, 19 Fed. Rep. 219.

I will not say that in no case and in no sense will registry or enrollment, under the laws of congress, carry evidence presumptive that the port where a vessel is registered and enrolled is her home port. On the contrary, when a vessel is away from home, in a foreign state and country, the port of her registry or enrollment will be presumed to be her home port, (see *Desty, Shipp. & Adm.*, and a line of authorities there cited;) but that such a presumption is conclusive, as against supply and material-men in a case like the one under consideration, is a proposition which is not sustained either by reason or authority. Here the steam-boat the *Lotus No. 2* appeared at the port of Mobile, hailing from the port of Columbus, in the state of Mississippi. Her enrollment was here, in the office of the collector of customs of the port of Mobile, which, on examination, would show where she belonged, and that her owners resided, not at Mobile, but at Columbus, Mississippi. While here, in this port, on the order of her master, she is furnished by supply and material-men presumably

upon her credit, and as to such claims, under such circumstances, the steam-boat was not in her home port, although enrolled here, and therefore a maritime lien exists for such supplies, which are entitled to priority of payment over the mortgagees, the Columbus Insurance & Banking Company; and it is so ordered.

### ISAIXSSON v. WILLIAMS and others.<sup>1</sup>

(District Court, S. D. New York. February 8, 1886.)

1. EVIDENCE—CHARTER-PARTY—WHEN LIMITED BY PAROL EVIDENCE OF CUSTOM—STEVEDORE—CUSTOM AS TO PAYMENT—FOREIGN MASTER, IGNORANT OF CUSTOM.

Where the words "stevedore to be selected by charterers, and paid by them," were inserted in the charter-party of a Russian ship, bringing hides from Montevideo to New York, and it appeared that the custom of this trade is for the ship to pay for a stevedore at New York, and the understanding of the trade is that a clause such as the above relates to a stevedore at the port of loading only; but it also appeared that the master had never before brought a cargo of hides or been to New York, and had no knowledge of the custom,—on suit brought by the captain against the charterers to recover money paid a stevedore at the port of discharge, *held*, that the clause, by its context, was specially connected with the port of discharge; that, construed independently of its context, it would naturally import payment by the charterers of all necessary services of a stevedore at port of lading or discharge, but might be limited, by proof of usage, to either port, provided it further appeared that both parties knew of the usage, and contracted with reference to it; but as it appeared that the master in this case had no knowledge of the custom, it could not be set up against him to defeat his rights under the charter-party, construed according to the natural import of its terms. *Held, also*, that the custom was at best one of persistent carelessness and inaccuracy, calculated, if not intended, to mislead and deceive those ignorant of it, and hence entitled to no favor, and admissible only on clear proof that the parties intended to be governed by it.

2. USAGE—GENERAL AND SPECIAL—PRESUMPTION OF KNOWLEDGE—EFFECT.

"If a usage is general, both parties are presumed to know it, and to contract in reference to it. If it is special and confined to a particular business, or has reference to a particular port only, there is no such presumption, and it would be unjust to admit it in order to restrict the natural meaning of a written contract, except upon proof that both parties were aware of and intended to be governed by it."

3. SPECIAL CUSTOM—PRESUMPTION—BY WHAT REBUTTED—WEIGHT.

"Even if, as respects a special custom in a particular trade, or between particular ports, there is a presumption that parties in the business contract in reference to the custom, this presumption is at best but a *prima facie* one, liable to be rebutted by proof that it was unknown to the party against whom it is set up, and on that being proved, no weight ought to be given it."

In Admiralty.

H. Putnam, for libellant.

S. M. Adams and John A. Deady, for respondents.

BROWN, J. This libel was filed to recover the sum of \$360, paid by the master of the bark Pehr Brahe for stevedore's services in discharging a cargo of hides at New York in January, 1885. The de-

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

mand is founded upon the provisions of a charter of affreightment, executed by the respondents at Montevideo, for the transportation of the cargo of hides thence to New York. The charter, besides the usual provisions, contained the following stipulations:

"The cargo to be shipped at the port of loading, and delivered at port of discharge, as customary, say to be brought to and taken from along-side the vessel at charterers' expense and risk; \* \* \* thirty-five running days (Sundays excepted) to be allowed for loading at port of loading. Discharging at port of delivery as customary *The stevedore to be selected by charterers, and paid by them the time employed in taking in ballast and changing ports of loading not to count as lay days.*"

In the original charter the sentence in italics is in writing, interjected in the midst of a printed sentence about the lay days. The other clauses are printed. On the arrival of the vessel in New York, the master called upon the respondents' agents to select and furnish a stevedore, which they declined to do. The master thereupon employed a stevedore to discharge the hides, at an expense of \$360; a portion of the crew assisting in the work, for whose services no charge was made. The value of the stevedore's work is not disputed.

The defense is that, by the established custom and usage of the trade in hides between Montevideo and New York upon charters in the same form as this, the ship is to pay for the services of a stevedore at New York; and that the understanding of the trade is that the clause in question relates to the employment of a stevedore at the port of loading only. The evidence offered at the trial was abundant to prove the alleged custom and understanding in this trade, as regards the ship's duty to pay for a stevedore in discharging at the port of New York, upon a charter like the present. The evidence was admitted provisionally under objection; and the case turns upon the competency of the evidence, and its effect as respects the master, who had no knowledge of the custom.

1. The clause in regard to the stevedore is written in the charter-party immediately following the printed words "discharging at the port of delivery as customary;" a clause relating to the *time* within which the discharge is to be made. Its position naturally connects it especially with the port of discharge, and with the acts of the parties at the port of delivery. If any weight were to be given to the circumstance that the word "stevedore" is used in the singular number, the natural reading of the charter would therefore confine its construction to the stevedore to be employed at the port of discharge only. The effect of the whole clause would then be that the stevedore at the port of discharge was to be selected and paid by the charterers; and that, for any delay in discharging beyond the customary period, the charterers must pay. Considering that the clause relating to the stevedore is inserted in the midst of a sentence relating exclusively to the port of discharge, and that its insertion there cannot be treated as a mere mistake or accident, since the very defense is that

the practice of thus inserting the clause is usual and customary, there is little rational ground for the claim of the respondents to disconnect it with the port of discharge.

But, giving to the charter the broadest latitude that is claimed for it as a commercial document, and treating the clause in question as an independent one that might appear in any part of the charter, disconnected from its present context, and construing the phrase in furtherance of the presumed intention of the parties, the phrase would naturally be interpreted as including the stevedore at the port of discharge as well as at the port of loading, provided a stevedore should there be necessary. The charter being for a lump sum, a stevedore was employed at the port of loading, in the charterer's interest, in order that the hides might be stowed as compactly as possible. To accomplish this, the hides of different consignees were mixed, and so stowed as to require a stevedore's services at the port of discharge. The necessity of a stevedore in unloading was admitted at the trial. Upon these facts the natural meaning and import of the clause relating to the stevedore are to require the charterers to pay for all necessary services of a stevedore at the port of discharge, as well as at the port of loading. But if the clause were regarded as ambiguous, from the use of the singular number, the general rule is that ambiguities in phrases inserted by the charterers are construed against them, and in favor of the ship. *The Martha*, 3 Rob. Adm. 106; *The John H. Pearson*, 14 Fed. Rep. 749, 752; *Carr v. Austin, etc.*, Id. 419; *Merrill v. Arey*, 3 Ware, 215, 218.

2. In the case of *Barnard v. Kellogg*, 10 Wall. 383. 390, the office of custom or usage is stated as follows:

"The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract,—whether written or in parol,—which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation, on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words and phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. 'Usage,' says Lord LYNTHURST, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' And it is well settled that usage cannot be allowed to subvert the settled rules of law."

So, in the case of *Merchants' Bank v. State Bank*, 10 Wall. 604, 667, Mr. Justice CLIFFORD uses the following language:

"Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed in the particular trade to which the contract refers, are used in a particular sense, and different from the sense which they ordinarily import; and it is also admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent; but it is never admissible to make a contract, or to add a new element to the terms of a contract previously made by the parties.

Such evidence may be introduced to explain what is ambiguous and doubtful, but it is never admissible to vary or contradict what is plain. Where the language employed is technical or ambiguous, such evidence is admitted for the purpose of defining what is uncertain; but it is never properly admitted to alter a general principle or rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law."

The usage offered to be proved in this case was not for the purpose of showing that the term "stevedore" meant anything different in this charter from its ordinary signification; nor would the effect of the evidence, if received, be to nullify the effect of the clause as it stands; for the charterers did select and pay for a stevedore at the port of loading. The purpose of the evidence of this usage is to limit the extent of the application of the clause in question by confining it to the port of loading only. Considering that the phrase is used in the singular number; that it is only by construction that it would be made ordinarily applicable, in the plural sense, to all the stevedores that might be necessary in the ordinary course of the voyage; and that the office of all construction and usage is to get at the intent,—I think that, if the clause in question could be justly severed from its context, the evidence of usage would be competent, and should be received in order to restrict the application of the phrase so as to accord with the actual intention of those who well knew the usage and contracted in reference to it. If a usage is general, both parties are presumed to know it, and to contract in reference to it. If it is special, and confined to a particular business, or has reference to a particular port only, there is no such presumption; and it is manifest that it would be unjust to admit it in order to restrict the natural meaning of a written contract, except upon proof that both parties were aware of the particular usage and intended to be governed by it. Even if, as respects a special custom in a particular trade, or between particular ports, there is a presumption that parties who are engaged in that trade contract in reference to the particular custom, this presumption is at best but a *prima facie* one, liable to be rebutted by proof that it was unknown to the party against whom it is set up; and, on that being proved, no weight ought to be given to it. This point was fully considered and sustained in the case of *Walls v. Bailey*, 49 N. Y. 464. Such, also, was the decision in *Kirchner v. Venus*, 12 Moore, P. C. 361; *Caldwell v. Dawson*, 4 Mete. (Ky.) 121; *Wheeler v. Newbould*, 5 Duer, 29, affirmed 16 N. Y. 392. See, also, *Insurance Cos. v. Wright*, 1 Wall. 456, 470; *Belmont v. Tyson*, 3 Blatchf. 530, 534; *Garrison v. Memphis Ins. Co.*, 19 How. 312, 316; *Bliven v. Screw Co.*, 23 How. 420, 431.

In the present case the bark was Russian, and the master a Russian, who had never before brought a cargo of hides from Montevideo to New York, and had never before come to this port. He testifies explicitly that he had no knowledge of the alleged custom, and there is no reason to discredit his testimony. On arrival at New York, he

called at once upon the ship's agents to furnish a stevedore in accordance with the apparent meaning, and with his understanding, of the charter-party. At Montevideo, when he observed the stevedore mixing the different consignments, he objected, saying that he might be blamed at New York. In reply, according to his testimony, one of the respondents told him that it made no difference to him, as he had nothing to do with the stevedore's bill on discharge.

It is urged that this testimony of the captain is not to be credited, because inconsistent with the present claim. Although, in a strict sense, the master might not be called on to object to mixing the hides at Montevideo if it were understood that the charterer's stevedore was to unload them at New York, yet mixing them would greatly add to the trouble of discharging; and it might, I think, well be considered by the master as likely to cause him to be blamed in New York, even if he were not obliged to pay the bill. I cannot recognize in this testimony, therefore, any such inconsistency as should discredit the master's testimony. Upon the evidence as it stands, it must be held that the master had no knowledge of the alleged custom; and that it therefore cannot be set up, as against him, to defeat his rights under the charter-party, construed according to the natural import of its terms.

The special customs so frequently invoked to modify the apparent rights of parties have been often a subject of judicial criticism. The custom invoked in this case is one specially open to objection. The charter is drawn in favor of charterers, at their port of residence, by brokers residing there, with secret reference to a custom taking effect at a distant port, materially modifying the fair import of the charter, and imposing a very considerable pecuniary burden upon the ship. If the open intention of the parties had been to limit the clause relating to the stevedore to the port of loading, nothing would seem simpler or more natural than to have inserted those words of limitation; so that the clause would have read "stevedore at the port of loading." To omit all such words of limitation, and to rely upon an alleged custom to supply their place, without making any mention of the custom to the master,—particularly a foreign master,—as in this case, who has little or no knowledge of the language in which the charter is drawn, and has never before made a similar charter or a similar voyage, is in the highest degree calculated to mislead and deceive. The very existence of the alleged usage, and the customary omission of the words "at the port of loading," when that limitation is intended by the resident parties, suggests no little suspicion that this practice is maintained, if it did not originate, from a willingness at the port of loading to mislead and to take advantage of foreign masters who are ignorant of the usage, and in consequence accede to lower freights. At best, the usage is but a usage of persistent carelessness and inaccuracy in expression, or else of intentional misrepresentation. In any aspect, it is directly calculated to deceive those

who are ignorant of it, because it serves as a material limitation on the natural import of the contract. It is therefore entitled to no favor, and can have no legal support, except upon proof that both parties had knowledge of the usage, and contracted in reference to it. As the contrary appears in this case, the defense cannot prevail, and there must be a decree for the libellant for \$360, with interest and costs.

---

THE GENEVA.

POOR v. THE GENEVA.

(District Court, W. D. Pennsylvania. January 28, 1886.)

**1. CARRIERS OF PASSENGERS—ACTION TO ENFORCE PENALTY AGAINST STEAM-BOAT FOR CARRYING AN UNLAWFUL NUMBER OF PASSENGERS.**

In a suit against a steam-boat to enforce the penalties prescribed by section 4465, Rev. St., for carrying an unlawful number of passengers, it appearing that the persons in excess of the allowed number aboard the boat were intruders against the will of the officers of the boat, and that the boat moved from her landing to another convenient place to avoid a crowd of people who it was feared might force their way upon her and endanger her, *held*, that the penalties were not incurred.

**2. SAME—LIBEL DISMISSED WITHOUT COSTS.**

But there being apparently good ground for the suit, and the case being one proper for judicial investigation, and, moreover, the answer not explicitly setting forth the real ground of defense, *held*, that while the libel must be dismissed, it should be without costs to the respondent, who also was adjudged to pay certain costs.

**In Admiralty.**

*Samuel M. Raymond and Joseph A. McDonald*, for libellant.

*Bird & Porter*, for respondent.

ACHESON, J. This is a suit against the steam-boat Geneva, to recover penalties imposed by section 4465 of the Revised Statutes,—and made a lien by section 4469,—alleged to have been incurred by reason of carrying upon the steam-boat a greater number of passengers than is stated in her certificate of inspection and the special permit for excursions issued to her under section 4466. The libel charges “that on the eighteenth day of October, 1885, while the said steam-boat was plying as a passenger boat on the Ohio river and its tributaries, to-wit, between Pittsburgh and Davis Island dam, the said boat received and carried passengers to an amount in excess of the numbers allowed, of two thousand or more.” The testimony is very voluminous. To recite it at any length or analyze it I shall not attempt. This would expand the opinion of the court unreasonably. I must confine myself to a bare statement of the facts, (for the most part,) with the conclusions I have reached after a patient investigation of the whole case.

The respondent Lewis N. Clark, the master of the Geneva, and one of her owners, had planned a Sunday excursion on the aforesaid

date, to Davis Island dam, with the Geneva, and the barges Alice and Edna in charge of the steamer Twilight; one of the attractive features of the occasion being an aquatic exhibition for the amusement of the excursionists by Captain Paul Boyton at Davis Island dam, or at such other point on the way as Clark might select. The Geneva lay at the foot of Wood street with her bow towards the shore. To her larboard or lower side was attached a coal-flat from which she had taken fuel. This flat extended down to the Parkersburgh wharf-boat, which, at the upper end, was connected with the shore by a staging. The excursion barges, Alice and Edna, with the steamer Twilight, lay below this wharf-boat. The excursion was advertised to leave the Pittsburgh wharf at 2:30 o'clock p. m. By that hour an immense concourse of people had assembled in the immediate neighborhood of the boats. The number of passengers the Geneva was authorized to carry was 300. The regular mode of receiving passengers on the boat was by a gang-plank extending from her bow to the wharf. The tickets for the trip on the Geneva were sold by William Brenneman, the clerk of the boat, at the foot of this gang-plank, and they were taken up by an agent of Boyton, who stood on the bow of the boat at the head of the plank. Both Clark and Brenneman testify—truly, I doubt not—that the former gave a positive order to the latter to cease selling tickets for the Geneva, and take in her gang-plank as soon as 300 tickets were sold; and there is satisfactory evidence that this order was strictly obeyed. But after the gang-plank was taken in a large number of persons got aboard the Geneva by way of the wharf-boat, and thence over the coal-flat already mentioned, and others got on the steam-boat from skiffs which plied between the shore and the upper side of the boat. It is impossible to determine from the proofs the exact number of persons who were on the Geneva when, as hereafter related, she backed out from the wharf. No one pretends then to have made a count of the people aboard of her, and such of the witnesses as speak of numbers give estimates only. The libellant's witnesses greatly differ in this particular; their estimates ranging from 500 to 1,500; one witness, perhaps, naming so high a number as 2,000. It is not surprising that there should be such discrepancy in a matter of mere opinion, especially in view of the confusion and excitement which prevailed that afternoon. The observation of Mr. Shepler, the engineer at the Monongahela House, deserves here to be pondered:

"The position [he says] in which the Geneva was lying—head on—when I went down the second time, was such that you could form but a very poor idea of the number on board, as 150 people on all three decks, crowded to the front, would make her appear very full."

It is shown that there were less than a dozen of persons in the cabin. Almost every body was on deck, sight-seeing, and most of the people were on the hurricane deck. It is indeed shown that the



steam-boat subsequently listed over, so that one of her guards took water, but this was occasioned by the people crowding to that side of the boat; and Mr. Neeld, one of the United States local inspectors of steam-boats and an experienced river man, testifies that less than 200 persons might so list the boat. A careful consideration of the proofs leads me to the conclusion that they justify the finding that the number of persons aboard the Geneva, exclusive of officers and crew, was 500. Higher, it would not be safe, in my judgment, to put the number. Whether the master or owners of the Geneva were legally responsible for this overcrowding of the steam-boat is now to be considered.

About the time the gang-plank of the Geneva was taken in, Capt. Clark, then on his way down to the other excursion boats, stopped at the Parkersburgh wharf-boat, and requested Peter Walter, the man there in charge, not to permit any person to pass over the wharf-boat to the Geneva; and it is abundantly shown that Peter and his assistants did put forth every possible effort to prevent the people from going over the wharf-boat, but in vain. They pressed on and over it to the Geneva in spite of all opposition. The situation is thus described by Peter: "Had I had two cannon with grape and canister I could have kept the people off, but not otherwise." Finally, to stop the crowd, the staging of the wharf-boat was thrown into the river. Doubtless many of the people who got on the Geneva by way of the wharf-boat and over the coal-flat had tickets for the excursion; but I am satisfied they bought them at points lower down the wharf, and for the excursion barges Alice and Edna. John Armstrong, the engineer of the Geneva, testifies that he saw other persons, besides those already mentioned, coming from the Alice, along the outside guard of the wharf-boat, and getting on the Geneva. His estimate is that 200 persons got on the Geneva by way of the wharf-boat, and at least 50 out of skiffs. His position on the lower deck gave him excellent opportunities for seeing. His testimony as to persons getting on the steam-boat by these irregular methods is well sustained by much other evidence. Thus, Richard Jones, the keeper of a boat store at No. 111 Water street, who himself got on the Geneva by way of the wharf-boat without paying, testifies that he thinks he saw 200 persons do the same thing.

The libelant contends that he has shown that the persons who came aboard the Geneva by way of the wharf-boat and by skiffs did so by permission of the officers of the Geneva, and that tickets or fares were collected from them by authorized parties. No doubt the libelant's witnesses who testify to this effect are honest enough, but I am entirely satisfied that they are mistaken. The clear weight of the evidence here is with the defense. At this particular time Capt. Clark was out on shore, and Thomas Boland, the mate of the Geneva, was the officer in command. He strikes me as a very candid and truthful witness. According to his statement,—and he is fully corroborated

rated by disinterested witnesses,—he and his subordinates exerted themselves to the utmost to prevent persons getting on the steam-boat after the gang-plank was pulled in. Save in the case of three or four ladies, all who entered the Geneva otherwise than by the gang-plank did so against the remonstrances and despite opposition of the mate and crew of the boat; and under all the proofs I have no hesitation in finding that all the persons beyond the authorized number of passengers who came on board the Geneva did so without the consent and against the will of her master, officers, and owners, and despite all reasonable efforts then possible on their part to prevent it.

That it may not be thought that I have overlooked the fact, it is proper just here to state that there is evidence that a few passengers (estimated by libellant's witness Louis Garber at from 15 to 20) were already scattered about the Geneva when Brenneman went out to the foot of the gang-plank to sell tickets; but, as an offset to this, it appears that some two dozen persons who there bought tickets from Brenneman did not at the time go aboard the Geneva, and it does not appear they went on her at all. Moreover, a few persons left the boat about that time.

When Capt. Clark was informed that the people were forcing themselves on the Geneva, he at once returned to the boat and took command. At this juncture, the steamer James G. Blaine came to the wharf, landing immediately above the Geneva. The crowd on the wharf at once made a rush for the Blaine, and many boarded her, some of whom jumped from her to the Geneva. There was an immense mass of people on the wharf in front of the Geneva, and there was danger of their forcing their way upon her. Capt. Clark therefore backed his boat out into the river,—grazing the Blaine as he did so,—and took the Geneva a few hundred yards—the space of about two squares—down the wharf, landing at or near the mouth of Ferry street. There Boyton gave his exhibition. Many people, by persuasion of the officers of the boat or because of their own apprehensions, here left the Geneva. After Boyton's exhibition was over the Geneva made her excursion to Davis Island dam and back, but her passengers on the trip, it is shown by actual count, numbered less than 200.

Mr. Neeld, when asked what, in his judgment, was the proper course for Capt. Clark to pursue under the circumstances just detailed, when the Geneva lay at the foot of Wood street, answered: "To do just as he did do,—back out from the crowd. That's what I would have done had I been captain of the boat." I have no doubt that this judgment is sound. If Capt. Clark had remained there, it would have been at the risk of sinking or capsizing his boat, to the great loss of human life. It was impossible for him to disembark his passengers at that time and place; nor had he the force to expel intruders. Indeed, had he attempted such a thing it must have brought on a serious riot. There were many rough characters in that crowd, both on and off the Geneva. Capt. Clark, therefore, was in the strict line of

his duty when he moved the Geneva from the mouth of Wood street down to Ferry street; and, as the persons aboard the boat in excess of the excursion permit were intruders, whom he carried against his will and under a species of compulsion, the penalties prescribed by the act of congress were not incurred.

The libel, therefore, must be dismissed, but without any costs to the respondent. Moreover, besides paying the commissioner's fees for his own testimony, the respondent must be adjudged to pay the expenses of the watchman employed by the marshal to take charge of the boat. Several reasons justify such order. There was apparently good ground for instituting this suit. Indeed, judicial investigation seemed to be demanded. Besides, had the respondent's answer been more explicit, and set forth the real ground of defense, the time occupied by this investigation might have been shortened very much. Let a decree be drawn in accordance with the foregoing opinion.

---

### LAW v. BOTSFORD and others.

(District Court, E. D. Michigan. February 8, 1886.)

#### 1. CARRIAGE OF GOODS BY VESSEL—DUTY OF VESSEL—DELIVERY.

A vessel discharges her whole duty to her cargo by delivering in good order all that she has received.

#### 2. SAME—CUSTOM—DEDUCTION FROM FREIGHT.

A custom to deduct from the freight earned the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the carrier shall not be permitted to show that he delivered all he received, is unreasonable and invalid.

#### 3. SAME—BILL OF LADING—POWER OF MASTER.

The master has no power to bind the vessel by an agreement in the bill of lading that the same shall be conclusive as between the shippers and carrier as to the quantity of cargo to be delivered to the consignees.

In Admiralty.

*F. H. Canfield*, for libelant.

*S. S. Babcock*, for respondents.

BROWN, J. This is a libel *in personam* for freight. The facts of the case are substantially as follows: In November, 1884, the schooner *Lizzie A. Law* took on board at Port Huron a cargo of wheat for Buffalo, and received two bills of lading, amounting to the sum of 46,047 bushels. The second mate attended to the loading in of the wheat from the elevator at Port Huron, and, with the weighman of the elevator, tallied the separate bins as they went on board the schooner, and upon completing the lading the master received two bills of lading, signed by the defendants, for this amount. The bills of lading contained the following somewhat extraordinary stipulation:

"It is agreed between the carriers and shippers and assigns that, in consideration especially of the freight hereon named, the said carriers, having su-

pervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive, as between shippers and assigns and carriers, as to the quantity of cargo to be delivered to consignees at the port of destination, (except when grain is heated or heats in transit,) and that they will deliver the full quantity hereon named, or pay for any part of the cargo not delivered at the current market price; the value hereof to be deducted from the freight money by consignees, if they shall so elect, and thereupon the carrier shall be subrogated to the shippers' and owners' rights of property, and action therefor."

The address on the margin was as follows: "Order of J. E. & W. F. Botsford, New York. Notify David Dows & Co., care E. B. Wilbur & Co., Buffalo, for transshipment only, identity to be preserved."

The vessel proceeded to Buffalo with her cargo, where it was weighed out at the elevators, and, as is not unusual, there was an apparent shortage of some 496 bushels. The elevator at Buffalo, conforming to a usage which is said to be well known, and indeed universal, deducted the value of these 496 bushels from the freight, and paid the residue to the master of the vessel. This action is brought to recover the amount of this unpaid balance of freight.

That the custom of deducting shortage in this way is, in the absence of an express stipulation, unreasonable and invalid, was settled by the supreme court of this state in the case of *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, in which the court held that the usage, however convenient, could only rest for its observance upon the consent of parties. It is a custom which has repeatedly been held void by the courts, and one which has been submitted to by shipmasters because the amount of the shortage is usually too small to justify the expense of litigation. At the same time there is no doubt that the vessel is bound to deliver all that she received, and that the fact that the cargo, when weighed out, does not tally as much as it did when it was weighed in, creates a presumption that some of it has been lost in transit, and throws upon the vessel the burden of showing that there has been no loss. But if the intermediate consignee deducts from the freight the value of the shortage, he does so at the peril of its being recovered back, if in fact there has been no loss in transit. In this case it appears very clearly, and that is one of the points in the case about which there is practically no dispute, that there was no loss in transit. The *Lizzie A. Law* delivered all she received. There was evidence tending to show that, at the Lime Kilns, a portion of the cargo was taken from one hatch, and wheeled over to another hatch, merely as a shift, for the purpose of decreasing the draught of the vessel forward, and increasing it aft; in other words, to trim the vessel so that she could get over the Lime Kilns. But there is no evidence that a bushel of the wheat was lost; indeed, the evidence is explicit that there was none.

It cannot be too well understood that a vessel has discharged her entire duty when she has delivered all she has received. This is not only the dictate of common sense, but is also the law as laid down

in *Shepherd v. Naylor*, 5 Gray, 591, and *Kelley v. Bowker*, 11 Gray, 428. So that, while the fact that the vessel did not tally as much at Buffalo as at Port Huron cast upon the master the burden of proving that she delivered all that she received, he fully satisfied this requirement, and hence I think is exonerated from liability in that particular. In this view it is not necessary for me to solve the question, which in its nature is insoluble, viz., whether the cargo was correctly weighed at Port Huron or at Buffalo. It is impossible for us to tell at this time where the mistake occurred. There was a mistake in measuring this cargo either inboard or outboard. If the mistake occurred at Buffalo, then the vessel is entitled to her freight upon the whole amount of the bill of lading. If the mistake occurred at Port Huron, she is entitled to her freight upon the Buffalo weight. As this is all that is claimed in this case, I am not obliged to determine whether the mistake was at one point or the other.

That the defendants in this case, aside from the stipulation in the bill of lading, are liable for the unpaid freight is beyond question. They were the consignors of the cargo, and the rule is well settled that the consignor may be resorted to, notwithstanding the cargo has been delivered to the consignee. That the original contract of the vessel is with him, and that the master may waive his remedy against the consignee, and resort to the consignor, I believe is uniformly held by the authorities. But in this case the defendants were not only the consignors, but they were also the consignees. The bill of lading is addressed to the order of J. E. & W. F. Botsford, New York, care of E. D. Wilbur & Co., Buffalo. The rule is also well settled that where the cargo is consigned to the care of another, that person is only the agent of the final consignee, who in this case is the consignor, so that, whether the defendants be sued as consignors or consignees, the action will lie against them. *Hutchinson, Carriers*, § 450.

It remains only to consider the effect of the stipulation in the bill of lading that the amount stated in the bill shall be conclusive as between the shippers and the carriers. This is certainly a very singular stipulation, and was designed undoubtedly to obviate the difficulties which are thrown in the way of deducting shortage, but we think the answer to it is not a difficult one. It is well settled by the case of *Grant v. Norway*, 10 C. B. 665, in England, and *The Freeman*, 18 How. 182, in this country, that the master has no authority to sign a bill of lading for a cargo not laden on board. Now, this is nothing more nor less than such a contract. It is an agreement that the amount named in the bill of lading shall be conclusive upon the vessel, though never a bushel may have been laden on board. The master has no authority to make a stipulation of this kind. It is possible that it would be binding between the consignor and the owner of the vessel if he assented to it personally, but the power of the master to bind his ship is limited to contracts made in the usual and ordinary course of business. In the above case of *The Freeman*, it is said

by the supreme court that the master has no more an apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. See, also, *Pollard v. Vinton*, 105 U. S. 7. His authority is to sign bills of lading of the usual tenor and description, consisting of a receipt for the amount shipped, subject to explanation, and a contract to deliver in the usual form at the port of destination. Such a contract the master has undoubtedly the right to sign, but he has no right to sign such contract before the cargo is laden on board. In this case there is no question of *bona fide* indorsement, and I think it very clear that the stipulation, while it may perhaps bind the master personally, is not obligatory upon the vessel.

The libellant is entitled to a decree for the residue of his freight.

---

THE A. R. WEEKS v. THE EPHRUESSI.

THE EPHRUESSI v. THE A. R. WEEKS.

(*District Court, E. D. Pennsylvania. January 29, 1886.*)

**COLLISION—UNUSUAL CARE—DAMAGES.**

Where a collision results from want of due care upon the part of a vessel, she is liable in damages.

In Admiralty.

Henry R. Edmunds, for the A. R. Weeks.

John L. Lane, for the Ephrussi.

BUTLER, J. The schooner had the right of way. It was therefore the bark's duty to keep off. She did not; and, in the absence of exculpatory proof, must be held to have been in fault. I find no such proof. The schooner kept her course, as was her duty, and the bark was unembarrassed. Why she did not keep off is sufficiently explained by the testimony and report of the pilot. In addition, however, to the want of care in controlling her course, of which he speaks, I think there was imprudence in approaching so near the schooner before taking measures to go under her stern. While the condition of the wind and tide, and character of the channel, presented no obstacle to the control of the bark tending to excuse her,—none which should not have been foreseen and provided against,—the circumstances were such as to call for unusual care. The failure to observe this care caused the accident.

A decree must be entered in favor of the schooner for full damages and costs, in each case. I find no evidence that she was guilty of contributory fault. It was her duty to hold her course until she saw

<sup>1</sup>Reported by C. B. Taylor, Esq., of the Philadelphia bar.

that collision was imminent. She was justified in expecting the bark to go under her stern. She had no reason to expect that this vessel would cease paying off; that she would come so close as to lose the benefit of the wind, and drift with the tide. When she discovered the danger, there was no time to avoid it. A failure to do the right thing under such circumstances is not a fault. It does not appear, however, that anything could have been done to avoid the result.

---

THE Z. L. ADAMS.

NICKERSON *v.* MONTGOMERY.

(District Court, S. D. New York. November, 1883.)

1. DISCHARGE OF CARGO—BILL OF LADING—USAGE OF TRADE—DEMURRAGE.

When a bill of lading fixes no time for the discharge of the cargo, the duty of a consignee is to use due diligence in procuring a berth, and to discharge, according to the custom of the trade; and for failure to exercise such diligence, demurrage is recoverable.

2. SAME—UPON THE FACTS ONE DAY'S DEMURRAGE ALLOWED.

The schooner *Z. L. Adams* arrived in New York, June 28th or 29th; and the respondents, to whom the cargo was sold, "to arrive," knowing that the facilities of their private pier were inadequate, began, on July 1st, to make inquiries for a suitable place of discharge. The inquiries were continued over the 2d and 3d, when a berth was found. Sunday and July 4th intervened. The vessel arrived at her berth on the 6th, and finished unloading on the 10th. The evidence showed four days to be a reasonable period for the discharge. *Held*, the respondents were chargeable with one day's demurrage,—June 30th,—as they showed no reason for deferring their inquiries for another berth until July 1st.

In Admiralty.

*Beebe, Wilcox & Hobbes*, for libelants.

*Geo. A. Black*, (*Scudder & Carter*,) for respondents.

BROWN, J. This action was brought to recover damages in the nature of demurrage for delay in unloading the schooner *Z. L. Adams*, which arrived with a cargo of 360 tons of ice, consigned to F. H. Smith, on June 28 or 29, 1880. Prior to arrival, the ice had been twice sold, to arrive, and was received by Montgomery & Co., the second vendees.

As the bill of lading fixed no period for the discharge of the cargo, the only obligation of the consignee, or his vendee, was to use due diligence in procuring a berth and to discharge, according to the custom of the trade.

The usage in respect to the discharge of ice, as a very perishable cargo, is no doubt somewhat peculiar. By the necessities of the case it must be discharged either into carts for immediate distribution at retail, as seems by the evidence to be most usual with vessels arriving in the summer season, or else sold to the wholesale dealers for

storage. The respondents were not the consignees of this ice, and I am not prepared to hold that any vendee of a consignee of cargo may keep a vessel awaiting her turn to discharge, after many prior vessels, at his own wharf, where, as in this case, he has no facilities for discharging more than one vessel at a time. See *Henley v. Brooklyn Ice Co.*, 8 Ben. 471; S. C. 14 Blatchf. 522. It is not necessary, however, to consider that point; because one of the respondents testified that "he found it was going to take too long" to discharge this vessel at his wharf, and he therefore set about finding another place of discharge, either among the wholesale or the retail dealers. He says he began to inquire July 1st, and followed it up till July 3d, when he found a berth at Pier 52, and gave notice at Smith's, the evident head-quarters of communication with the libellant. As July 4th and Sunday intervened, the vessel did not arrive at her berth until July 6th. She was discharged on the 10th. For the discharge of ice and the dunnage about four days appear to be a reasonable time by the evidence; and this time was not exceeded. But as the respondents are chargeable with knowledge of the facilities at their own wharf at once, on the report of the vessel, which was early on June 28th or 29th, there is no reason why they should have delayed at least one whole day before beginning to make inquiries for another berth. The respondents should be charged for this day's delay. It is uncertain from the testimony whether the schooner reported June 28th or 29th, and I therefore allow demurrage for one day only, at the rate of eight cents per ton per day, or \$28.80, with interest from July 10th, \$4.75, making \$33.55, with costs, for which amount judgment may be entered for libellants.



JENKINS and others v. HANNAN and others.<sup>1</sup>*(Circuit Court, S. D. Ohio, W. D. April 19, 1884.)*

## 1. EQUITY—ADEQUATE REMEDY AT LAW.

Upon a bill in equity to set aside deeds made on orders of sale of lands in judicial proceedings, which were alleged to be null and void, and for an account of rents and profits, *held*, that there was a plain and adequate remedy at law by an action of ejectment for the recovery of the possession of the lands and the mesne profits.

## 2. SAME—JUDGMENT AGAINST ONE IN REBELLION.

J. was a resident of a county that became a part of West Virginia, and left his home and entered the Confederate army, and continued in armed hostility to the Union until his death. During the time he was so engaged suit was commenced in Ohio by creditors against him, attachment levied on his lands there situated, and constructive service made upon him. Judgment was had, and such lands sold upon orders therefor. Upon bill in equity by his heirs against the purchasers and others in possession to set aside said sales on the ground that said proceedings were void, *held*, (1) that equity had no jurisdiction; (2) that J. having voluntarily left his country for the purpose of engaging in hostility against it, his heirs cannot justly complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where such proceedings were conducted.

In Equity.

*Franklin T. Cahill and Goode & Huff*, for complainants.

*T. D. Lincoln*, for defendants.

SAGE, J. The complainants are the children and heirs at law of Albert G. Jenkins, who died May 21, 1864.

The bill sets forth that on the seventeenth day of May, 1862, Albert G. Jenkins was, and had been for many years, the owner in fee-simple of certain improved real estate situate in the city of Ironton, Lawrence county, Ohio, and described in the bill: that in the months of July and August, 1861, certain parties named in the bill brought five several actions at law in the court of common pleas of Lawrence county, Ohio, against said Albert G. Jenkins and others, and sued out attachments based on the non-residence of said Jenkins, which were levied upon said real estate; that service was made by publication, judgments taken in each of said cases,—in three of them by default, and in the remaining two upon trials on the issues joined by answers filed by H. S. Neal, an attorney at law, as attorney for said Jenkins. The complainants allege that Neal acted as such attorney without the knowledge or authority of said Jenkins, who, they allege, never knew of the institution of said suits, or any of them, or of any of the proceedings thereupon. The complainants further allege that upon each of said judgments an order for the sale of said real estate was issued, and upon said order the same was, on the seventeenth day of May, 1862, sold to the defendant William F. Hannan for the

<sup>1</sup> Reported by J. C. Harper, Esq., of the Cincinnati bar.

price and sum of \$2,750, and was subsequently conveyed by deed to him by the sheriff of said county of Lawrence; that afterwards, to-wit, on the twenty-third day of October, 1866, said Hannan sold and conveyed said real estate to the defendant the Second National Bank of Ironton for the sum of \$12,500, and on the twenty-ninth of September, 1868, said bank sold and conveyed a portion of said real estate to the defendant Jeremiah Davidson; that said deeds were inoperative, void, and of no effect, and so was each of them, to pass the title to said real estate, for the reason that said judgments were void; that said bank and said Davidson are in possession of said real estate, and claim the ownership thereof under and by virtue of said judgments, sales, and conveyances; and that they have no other right or claim thereto.

Complainants further aver that prior to the institution of said suits, to-wit, on the twenty-ninth of May, 1861, said Albert G. Jenkins entered the military service of the so-called Confederate States of America, and continued therein and remained within the limits of said so-called Confederacy, without departing therefrom, thenceforth until his death, which they say took place on the twenty-first of May, 1864, at which time he held the rank of major general in said service; that during the year 1861, and for many years prior thereto, he was and had been a resident of the state of Virginia; and that he was from the twenty-ninth of May, 1861, until his death continuously, and without interruption, engaged in armed hostility against the government of the United States, all of which facts were well known to the defendants, one of whom, said Davidson, was on said twenty-ninth of May, 1861, a tenant of said Jenkins, and has ever since that date occupied the same property that he afterwards, as aforesaid, bought; that at the time of making service by publication in said cases said Jenkins was, as each of said defendants well knew, a resident of Virginia, living within the district covered by the proclamation of the president of the United States, and was by said proclamation prohibited from holding any intercourse with persons living in the county of Lawrence and state of Ohio, and being an enemy of the United States, he could not lawfully obey any summons issued or published by any court of said state, nor could he have appeared or defended said suits had he known that they were pending; that said defendant Hannan was an intimate acquaintance of said Jenkins, and at the time of purchasing said real estate at said sheriff's sale openly proclaimed that he did so to save the property for said Jenkins or his heirs. Complainants further allege that said real estate at the time of said sale was well improved, and ever since said time has been yielding the defendants a rental of \$100 per month. Wherefore complainants pray the court to set aside said pretended judgments and sales, and declare them null and void; that the said deed to said Hannan may be delivered up and canceled, and an account taken of said rents and profits of said real estate, and charged to the defendants; and that the plaintiffs may be at liberty

to redeem said premises on payment to the defendant Hannan of the amount he paid for said premises at said sale, less the rents and profits as aforesaid; and that thereupon the defendants be ordered and required to deliver possession of said premises to the complainants, free of all incumbrances done or suffered by the defendants, or either of them; and that the deeds under which the defendants claim may be delivered up for cancellation. The bill concludes with a general prayer for relief.

The defense is a denial of the invalidity of the judgments and sale thereunder, and a denial that Neal, who it is admitted acted as attorney for Jenkins, did so without authority. Defendants admit that Jenkins was an inhabitant of the state of Virginia, but they aver that his residence was at the date of said judicial proceedings, and always had been, upon his farm on the south bank of the Ohio river, in Cabell county, in said state, and that from the breaking out of the rebellion, in April, 1861, until June 19, 1863, that part of the state of Virginia lying west of the Alleghany mountains, embracing some 48 counties, and including the county of Cabell, had a state government for the state of Virginia, with its capital at Wheeling, and with Francis H. Pierpoint as governor, and that the same was the legal and valid government of the state of Virginia; that under proceedings had with the consent of the state of Virginia, the state of West Virginia, composed of the counties aforesaid and others, was organized, and was admitted into the Union, and from and after June 19, 1863, became and was one of the states of the United States. And the defendants aver that said Albert G. Jenkins was, during a large portion of his time from the breaking out of the rebellion until his death, in the said county of Cabell, and in other counties of West Virginia. Admitting that said Jenkins was in armed hostility to the government of the United States, they aver that he was voluntarily so engaged, in opposition to the views of a large majority of the inhabitants of Cabell county, and of West Virginia; that none of the territory now included in West Virginia was ever in armed hostility to the government of the United States, or recognized by the government of the United States as enemy's territory, or included in the president's proclamation; wherefore they aver that said Jenkins never was prohibited or prevented from holding intercourse with the citizens of the loyal portion of the United States. Defendants deny that said Jenkins was ignorant of the institution of said suits, and aver that when they were brought, and continuously thereafter, while they were pending, said Cabell county was within the lines of the army of the United States. Defendants deny the averments of the bill as to the rents of said real estate, and the defendant Hannan denies that at the time of his purchase he proclaimed that he made the purchase to save the property for Jenkins or his heirs.

As to the averment by the complainants that defendant Hannan proclaimed, when he bought the property, that he did so for the ben-

efit of Jenkins or his heirs, it cuts no figure in the cause for two reasons: *First*. It is averred that Hannan sold and conveyed the real estate which he purchased to the defendant the Second National Bank of Ironton, and it is not averred, nor is there any attempt to establish by proof, that the bank had any notice that Hannan bought as agent or representative, or for the benefit of Jenkins or his heirs; and as he held the deed in fee-simple, in his own name, the bank took free from any obligation of trust or agency resting upon Hannan. *Second*. Even if the bank had notice, it was competent for the complainants to elect whether to treat the deed to Hannan as a nullity, for the reason that it was made under void judgments and a void sale, or to affirm the sale and deed by waiving their invalidity, and sue to enforce a trust against Hannan. They have elected to treat the judgments as void, and the sale as a nullity, and having made their election, they are bound by it. "A ward or heir may elect to affirm a void sale, and thus entitle himself to the proceeds. When a valid election is once made, it cannot be revoked." *Freem. Jud. Sales*, § 48; *Jennings v. Kee*, 5 Ind. 257.

It may be suggested, also, that if Jennings was at the time of the bringing of the suit, and of the sale, an enemy, inhabiting the enemy's country, and prohibited by the president's proclamation from holding intercourse with inhabitants of the loyal portions of the United States, as the complainants insist, it is at least doubtful whether Hannan could have become his trustee or agent.

No advantage can be taken in this court of mere irregularities or errors in the suits under which the sale of the real estate described in the bill was made, for the reason that those cases could be reviewed, and the errors or irregularities corrected, only by the highest courts of the state. Moreover, under the law of the state of Ohio, it was provided that the reversal of a judgment should not affect the title of the purchaser to lands sold for the satisfaction of the judgment. 51 Ohio L. 57. To establish their title the complainants must therefore proceed upon the theory that the judgments are void. "A void judgment, order, or decree, in whatever tribunal it may be entered is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it, are void. Hence a sale based on such a judgment, has no foundation in law; it must certainly fall. Judicial proceedings are void when the court wherein they take place is acting without jurisdiction." *Freem. Jud. Sales*, §§ 2, 3, 42. "A void judgment is in legal effect no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress." *Freem. Judgm.* § 117. These statements of the law are sustained by the entire cur-

rent of authority, and they are so well settled that they are not open to question.

The complainants allege, and the defendants admit, that the defendants are in possession. The complainants allege that the judgments and deeds under which the defendants hold are utterly void; that, as has already been stated, is the only claim upon which they can stand. What is there, then, in the complainants' bill within the jurisdiction of a court of equity? If the judgments against Jenkins are void, and the sale and deed made thereunder a nullity, what is there to cancel or set aside? If Hannan acquired no right or title by his purchase, if, as the authorities without exception declare, he was, being a purchaser under a void judgment, a mere trespasser, without right and without title, what need to tender, or offer to pay, the purchase money? If the defendants are, as the complainants insist, in possession of complainants' lands without title, under deeds which are wholly invalid, why is not an action of ejectment the proper remedy? If it be, equity has no jurisdiction. Section 723, Rev. St., provides that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. This is but the statement of a well-known rule in equity, and it has been recognized by express enactment ever since the judiciary act of 1789.

It may be urged that the bill prays for an account of rents and profits, but a claim for mesne profits can be asserted in an action of ejectment, and furnishes a plain, adequate, and complete remedy. *Lewis v. Cocks*, 23 Wall. 466, is exactly in point, and conclusive. There a bill in equity was filed to recover possession of lands sold in 1863 upon execution, to satisfy a judgment rendered by the provisional court of New Orleans, (a court established by proclamation of President Lincoln while New Orleans was occupied by troops of the United States,) against Cocks, then absent from the state, upon service made upon one Hallsted, who, it was alleged in the petition, was Cocks' agent. Execution was issued, and two houses and lots, the property of Cocks, were sold. The purchaser, one Izard, subsequently mortgaged the property to Lewis, who caused it to be sold under the mortgage, and became the purchaser. Relief was prayed for in the bill on the grounds (1) that the provisional court was a nullity, and the judgment against Cocks void; (2) that no service of process had been made upon Cocks, and that Hallsted was not his agent, and therefore that service made upon him was not valid service as against Cocks; (3) that Izard, the purchaser at the sale made in pursuance of the judgment, professed to be the friend of Cocks, and to be buying the property for his benefit. The complainants tendered back the purchase money, with interest, and they also demanded (as appears from the argument of their counsel) an account. The court held that the provisional court was a valid court, that the fraud charged upon the purchaser, that he represented that he in-

tended to buy the property for the benefit of the judgment debtor, was not sustained by the evidence, and proceeded, Justice SWAYNE pronouncing the opinion:

"It must be borne in mind that the complainant is not in possession of the property. If the bill alleged only the nullity of the judgment under which the premises were sold, by reason of the non-service of the original process in the suit, wherefore the defendant had no day in court, and judgment was rendered against him by default, and upon these grounds had asked a court of equity to pronounce the sale void, and to take the possession of the property from Izard and give it to the complainant, could such a bill be sustained? Such is the case in hand. There is nothing further left of it, and there is nothing else before us. Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain and adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisprudence is as old as the earliest period in its recorded history. The sixteenth section of the judiciary act of 1789, enacting 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law,' is merely declaratory, and made no change in the pre-existing law. \* \* \* In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel. Nevertheless, if it clearly exists, it is the duty of the court *sua sponte* to recognize it, and give it effect. It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. \* \* \* In the present case the bill seeks to enforce 'a merely legal title.' An action of ejectment is an adequate remedy. The questions touching the service of the process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review, they can be better presented by bills of exception and a writ of error than by depositions and other testimony and an appeal in equity. There is another important point which we have not overlooked. It is whether the judgment of the provisional court can be pronounced a nullity without the legal representatives of Anderson, the deceased plaintiff, being before the court as a party. As the first objection is a fatal one, we have not considered that question."

The case of *Ellis v. Davis*, decided November 10, 1883, and reported in 109 U. S. 485, S. C. 3 Sup. Ct. Rep. 327, is also in point. There it was held that "where an heir at law brings a suit in equity to set aside the probate of a will in Louisiana as null and void, and to recover real estate, and prays for an accounting of rents and profits by an adverse party in possession, who claims under the will, this court will refuse to entertain the prayer for recovery of possession if the complainant has a plain, adequate, and complete remedy at law. \* \* \* By the laws of Louisiana an action of revendication is the proper one to be brought for the purpose of asserting the legal title and right of possession of the heir at law to the succession, where another is in possession under claim of title by virtue of a will admitted to probate. In a proper case as to parties this action can be brought in the circuit court of the United States; and as it furnishes a plain, adequate, and complete remedy at law, it is a bar to the prosecution

of a suit in chancery." Sarah Ann Dorsey bequeathed by her last will and testament all her property, real and personal, to Jefferson Davis, in consideration of her admiration for him as ex-president of the Confederate States. The bill charged that the will was not valid, and prayed for its cancellation; that it be decreed that the defendant at once surrender possession of all said property; that the defendant be perpetually enjoined from setting up or pleading said alleged will, or any title thereunder, and for an account of the rents and profits received by him of said estate. It was admitted that the defendant was in possession, and that he held adversely to the complainants. The court said, Justice MATTHEWS pronouncing the opinion, that any right which the complainants could assert against the defendant for the rents and profits of the estate was altogether dependent upon their title to that estate, and could not arise until that was established. The court further said that the title which the complainants asserted was not an equitable, but a legal, title, as heirs at law and next of kin of Sarah Ann Dorsey, and was to be established and enforced by a direct proceeding at law for the recovery of the possession which they alleged the appellee illegally withheld; and that there was no ground, therefore, on which the bill could be supported for the account as prayed for.

The bill will be dismissed, at the costs of the complainants. The decree will contain a finding that the complainants have a plain, adequate, and complete remedy at law. See *Lessee of Lore v. Truman*, 10 Ohio St. 45.

I have purposely avoided expressing any opinion upon questions argued upon the hearing, and not passed upon, for the reason that it would be manifestly improper to anticipate the questions that will arise if an action of ejectment be brought, but are not necessary for the decision of the cause now before the court.

---

(January 19, 1885.)

UPON PETITION FOR REHEARING.

SAGE, J. I have carefully re-examined the questions presented in this cause on the hearing, and those presented upon the application for rehearing, and am brought to the conclusion that there is no ground for a rehearing. The complainants' bill is framed in accordance with their claim that the court of common pleas of Lawrence county, Ohio, had no jurisdiction whatever in the five cases mentioned in the bill, and that therefore all the proceedings in those cases, and the sale under them, were null and void *ab initio*; and the argument of counsel proceeded on that ground. The defendants are in possession. If the court which rendered the judgments under which the sale was made to their grantors had no jurisdiction, the defendants are mere trespassers, and the action of ejectment is the proper rem-

edy, and equity has no jurisdiction, as was decided upon the hearing. I still adhere to that opinion. The case of *Hipp v. Babin*, 19 How. 271, cited with approval in *Ellis v. Davis*, 109 U. S. 485, S. C. 3 Sup. Ct. Rep. 327, is to my mind conclusive, not only as to the proposition above stated, but also against the claim that the court should retain the bill for an account of rents, profits, and improvements, as well as against the claim that the parties may confer jurisdiction by consenting to recognize the parties in possession as trustees, to whom the complainants may pay the amount, with interest, paid by their grantors at the sale made by order of the court, under which they claim. See, also, *Root v. Railway Co.*, 105 U. S. 212.

But independently of this view, and conceding for argument's sake the jurisdiction of equity over the case presented, the bill was properly dismissed upon the authority of *Ludlow v. Ramsey*, 11 Wall. 581-589. The language used by Justice BRADLEY in announcing the opinion of the court is applicable here: "But if, as in this case, a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted. That would be carrying the privilege of *contra non valentem* to an unreasonable extent." See, also, *University v. Finch*, 18 Wall. 106-111; *McQuiddy v. Ware*, 20 Wall. 14. In this last case it was held that "a man who has neglected his private affairs, and gone away from his home and state for the purpose of devoting his time to the cause of rebellion against the government, cannot come into equity to complain that his creditors have obtained payment of admitted debts through judicial process obtained upon constructive notice." In that case Justice DAVIS, in the course of his opinion, made the following statement, which is strongly in support of the decision by this court in this case rendered after the hearing:

"But if the proceedings, instead of being irregular and voidable, are null and void, as they are characterized in the bill, the remedy at law is complete; for there is in such a condition of things nothing in the way of the successful maintenance of an action of ejectment, which will result, not only in the restoration of the lands, but also of their rents and profits."

The case of *Haymond v. Camden*, 22 W. Va. 194, cited by counsel for complainants, is not recognized as authority by this court. It is in conflict with the cases above referred to, and they are the cases by which this court will be guided, without regard to any others asserting the contrary doctrine. Besides, the case of *Haymond v. Camden* rests upon a provision of the constitution of West Virginia, adopted since the admission of that state to the Union, and since the close of the rebellion, and effective, if not intended, for the protection and benefit of those who were engaged in the rebellion.

Upon the request of counsel on both sides I state my opinion upon



these questions, which I declined to pass upon in the former decision of this case; it being suggested also that no action at law will be brought.

The application for rehearing is denied.

---

DUNDEE MORTGAGE & TRUST INVESTMENT Co., Limited, v. COOPER  
and others.

(Circuit Court, D. Oregon. March 12, 1886.)

1. EVIDENCE—PROOF OF FOREIGN STATUTE.

The testimony of a credible witness, whether a lawyer or a layman, with reasonable means of information, to the effect that a volume containing what purports to be a statute of a foreign country is commonly received in the business and courts of such country as such, is competent and sufficient proof of the existence of such statute.

2. CORPORATION—CERTIFICATE OF INCORPORATION.

A certificate of incorporation under section 18 of the companies' act of Great Britain may be issued in duplicate, and at any length of time after the memorandum of association is registered in the office of the registrar.

3. SAME—PROOF OF.

Such certificate, when delivered to the corporation, is a private writing in private custody, and cannot be proved by an examined copy. The original must be produced, if in existence.

Suit to Enforce the Lien of a Mortgage.

*Earl C. Bronaugh*, for plaintiff.

*Ellis G. Hughes*, for defendants.

DEADY, J. This suit is brought to enforce the lien of a mortgage, given to secure the payment of a note for \$10,000, with interest. It was commenced on October 28, 1884, in the state circuit court for the county of Linn. On March 12th the defendants, D. M. Cooper and Rebecca, his wife, J. H. Wilson and Mary, his wife, J. M. Wilson and Matilda, his wife, answered the complaint, denying the corporate existence of the plaintiff, whereupon the latter, on April 7th, removed the cause into this court, where the same was heard on February 3, 1886, on the complaint, answer, evidence, and exhibits.

On the hearing the point was made that the answer should have been replied to, and the court, without passing on the question, allowed the plaintiff to file a replication thereto, *nunc pro tunc*, which was done on February 5th.

It is alleged in the complaint that the plaintiff is a corporation, duly organized under the laws of Great Britain, with its principal office at Dundee, Scotland; that on April 14, 1881, the Oregon &

Washington Mortgage Savings Bank, a corporation also duly organized under the laws aforesaid, loaned to the defendant D. M. Cooper the sum of \$10,000, for which he made and delivered to said corporation his promissory note, payable to its order, on December 1, 1885, and also five other notes, payable to its order, on December 1, 1881, 1882, 1883, 1884, and 1885, respectively, for the several amounts of interest payable on said loan at said dates, at the rate of 10 per centum per annum, amounting in the aggregate to \$14,632.90, and at the same time, together with the defendant Rebecca, his wife, executed and delivered to said corporation a mortgage of sundry parcels of land in said county of Linn, as a security for the payment of said notes, which was duly recorded on June 9, 1881; that on May 15, 1882, the defendants D. M. Cooper and Rebecca, his wife, conveyed said land to the defendant J. H. Wilson, in part consideration whereof the latter assumed and agreed to pay the notes aforesaid; that on February 23, 1883, said Oregon & Washington Mortgage Savings Bank, for value received, assigned said notes and mortgage to the plaintiff herein, who is now the owner of the same; that said defendants Cooper and Wilson have not paid said notes or any one or part thereof, and therefore the plaintiff, pursuant to a provision in said mortgage, now declares the whole of the principal sum of said loan, and the interest accrued thereon to be presently due; that, by the terms of said mortgage it is also provided that in case a suit is required to be brought to enforce the lien of the same, that there shall be taxed in favor of the plaintiff therein an attorney's fee of 10 per centum on the amount due on said notes; that the defendants George E. Chamberlain, W. E. Edwards, N. Whealdon, J. M. Wilson, and Matilda, his wife, have some interest in or lien on the premises, subsequent to the mortgage aforesaid, the nature or value of which is unknown to the plaintiff. The complaint prays for a decree against D. M. Cooper and J. H. Wilson for the sum of \$12,632.90, and \$1,000 attorney's fee, together with costs and disbursements, and, in default of payment thereof, for the sale of the premises to satisfy the same.

The defendants D. M. Cooper and J. H. Wilson, having contracted with the Oregon & Washington Mortgage Savings Bank as a corporation, concerning the payment of this money, are estopped thereby to deny its corporate existence, or power to make such contract. *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 10 Sawy. 470; S. C. 22 Fed. Rep. 245; Ang. & A. Corp. (9th Ed.) 640. But as to the assignee of such corporation, the plaintiff, the case is otherwise. The plea or answer of the defendants purports to be in abatement. A denial of the corporate existence of a corporation not only controverts its right to sue, but also the cause of action. However, it seems that a party may, if he will, plead such non-existence in abatement only. *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 10 Sawy. 469; S. C. 22 Fed. Rep. 245. This plea or answer consists simply of a denial of the allegation in the complaint that the plaintiff is a corporation duly

organized under the laws of Great Britian. In effect it is the old plea of *nul tiel* corporation.

By the provisions of the Code, under which these pleadings were made, this affirmative and negative allegation made an issue. Together they constitute a fact, affirmed on the one side, and denied on the other. There is no new matter in the answer, and therefore there is nothing really to reply to. Nevertheless, it seems, that at common law, the analogous plea of *nul tiel* record requires a replication to put the matter formally in issue. 1 Chit. Pl. 632. And in equity it seems that the matter in a plea, whether negative or affirmative, is put in issue by a replication thereto. Story, Eq. Pl. § 697. This anomaly could and should be cured by a rule of the supreme court dispensing with a replication to a plea, unless and only so far as it contains new matter.

Upon the evidence taken on the plea two questions arise: (1) Is the proof of the law of Great Britian, under which it is claimed the plaintiff was incorporated, sufficient? and (2) is the proof of the incorporation thereunder also sufficient?

The only witnesses examined as to the law are William Mackenzie and Hugh Rogers. The former is a resident of Dundee, Scotland, a stockbroker, and the secretary of the plaintiff from the time of its organization. The latter is the resident agent of the plaintiff in Portland for the past three years; but he is a native of Scotland, and resided there until he came here, during which time he was engaged as an accountant, for six years in Edinburgh, in the management of corporations organized under the law of Great Britain, and with the winding-up of the same, under the supervision of the court of sessions, the highest court in Scotland. They both testify that Exhibit A, a bound volume of statutes, purporting to be the acts of the parliament of Great Britain on the subject of "the incorporation, regulation, and winding-up of trading companies and other associations," including the act cited as "The Companies' Act, 1862," and sundry amendments thereto, made in the years following, and as late as 1883, is published by William Blackwood & Sons, the queen's printers, in Scotland, under license from the government, and is commonly received in Scotland as an authoritative copy thereof; and Mr. Rogers says that copies of this publication are universally received by all professional men and all courts in Scotland as official, and there are no other official copies of the companies' act in use there; and that the book is generally received in Scotland as published by authority of a license from the government issued by the lord advocate for the time being. On the first page of the book there is an imprint of the royal arms, and the title:

*"Anno vicesimo quinto & vicesimo sexto Victoriae Reginae.*

*"Cap. LXXXIX.*

*"An act for the incorporation, regulation, and winding-up of trading companies and other associations, (7th August, 1862.)"*

Then follows the act,—the enacting clause being to the effect that the same is enacted by the queen with the advice and consent of the lords and commons in parliament assembled,—the first section thereof providing that it may be cited as “The Companies’ Act, 1862.”

In *Ennis v. Smith*, 14 How. 426, the supreme court say that there is no general rule prescribing the mode of authenticating a foreign statute, but that it “may be verified by an oath, or by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorized by law, to give the copy, which certificate must be duly proved. But such modes of procedure as have been mentioned are not to be considered exclusive of others, especially of *codes of laws* and accepted histories of the law of a country. In that case the court held that a copy of the French Civil Code was sufficiently proved when it bore the imprint of the French royal press and was received in exchange between the two countries, with the indorsement: “*Les Garde des Sceaux de France a la Cour Supreme des Etats Unis.*”

By the Code of Civil Procedure of this state (section 733, sub. 4) it is provided that “the proceedings of the legislature of a foreign country” may be proved “by journals, statutes, or resolutions published by their authority, respectively, or *commonly received in that country as such.* \* \* \*”

The argument of counsel for the defendant assumes that a foreign statute, unless shown by a sworn or certified copy of the original, can only be proved by the testimony of an expert, who, from personal familiarity with the subject, is able to state from memory the exact provisions of the act, and the accepted interpretation of it in the place of its enactment. But this is altogether too narrow and impracticable a view of the subject. Both the common or customary and the statute law of a foreign country may be shown by books of acknowledged or proven reputation or credit therein. In this age of printing and publication the law is no longer locked up in the breast of the human oracle, but is deposited in unsealed volumes, where it can be known and read of all men. The testimony of a credible witness, having ordinary means of information, that a certain publication is commonly received as a true copy of a statute in the country of its enactment is better and more satisfactory evidence of the existence of the statute than the testimony of any expert, speaking from memory alone.

In the case of *The Pawashick*, 2 Low. 142, Mr. Justice LOWELL examines this subject with his usual care and good sense. The opinion contains many valuable and timely suggestions on the subject. In the course of it (page 146) he says:

“The relations which we hold to England in the common origin of our laws, a similar mode of legal reasoning, the habit of studying and citing the English cases, the common language, and frequent intercourse between the

two countries, render it safe and proper to adopt a similar practice with respect to the laws of that country that the states of this Union have generally found it expedient to carry out in relation to each other. It was soon found in trials in the United States that the danger of mistaking the laws of the other states was, on the whole, a less evil than the danger of injustice and delay, if the strict proof were required in every case. In consequence of this discovery many of the states have passed laws admitting the printed statutes and books of reports of sister states to be read in evidence. See Story, Conf. Laws, (Redf. Ed.) § 641a. But before these statutes were passed, or without their aid, the courts of some states have taken this step for themselves. *Thompson v. Musser*, 1 Dall. 458; *Raynham v. Canton*, 3 Pick. 293; *Young v. Templeton*, 4 La. Ann. 254; *Lord v. Staples*, 3 Fost. 448. In two of these cases a query was made whether foreign statutes, strictly so called, could be proved by printed copies only, even with evidence tending to show the authenticity of the copies. But such statutes have been received in two cases in which it was merely proved that they were bought of the public printer, (*Jones v. Maffet*, 5 Serg. & R. 523; *In re Certain Casks of Hardware*, 4 Law Rep. 36;) in another, because the Code had been promulgated by the executive department of our government as authentic, (*Talbot v. Seeman*, 1 Cranch, 1;) in another, because the copy had been sent to the supreme court of the United States by authority of a foreign government, (*Ennis v. Smith*, 14 How. 400.) In that case it was said, as the *ratio decidendi*, that a foreign written law may be received when it is found in the statute book, with proof that the book has been officially published by the government that made the law. This does not exhaust the list of cases nor the actual or possible modes of authentication. The only rule to be made out of the late American cases is that *the copy of the statute must be shown, to the reasonable satisfaction of the court, to be genuine*. Now, we all know, and it is virtually admitted in this case, as I understand the argument, that we are fully as well able to verify the printed copies of the merchant shipping act as any expert could be. In the case in 4 Law Rep. 36, Judge BETTS said he should have received the statute, without the oath which proved it to have been bought of the queen's printers. The law is a progressive science, and, if printed books have superseded manuscripts, and are cited instead of certified copies, we may as well acknowledge the fact and act accordingly. Between the doctrine, which has never obtained in America, if it does anywhere, that there must always be a sworn expert, and one which shall admit printed books of known authority to prove foreign statutes, I see no safe middle ground."

The proof in this case is altogether satisfactory that the publication in question is commonly received in Scotland as a true copy of the statute of Great Britain called "The Companies' Act, 1862." There is no room for doubt, and no one conversant with the matter has any on the subject. The witnesses who state the fact are credible. Nothing appears to affect either their veracity or intelligence; and their means of knowledge are sufficient to enable them to speak unqualifiedly, and entitles them to be heard with confidence. It is not necessary that they should be lawyers. They do not testify as experts, although they might be able to, within the rule laid down in *American Life Ins. & Trust Co. v. Rosenagle*, 77 Pa. St. 514, but as common witnesses, to a fact within their observation, namely, that the publication in question is commonly received in the business and courts of Scotland as sufficient proof of the existence and terms of the act concerning the incorporation of trading companies of August 7,

1862. The provisions of the companies' act relative to the question of the incorporation of the plaintiff, are as follows:

"Sec. 6. Any seven or more persons associated for any *lawful purpose* may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability."

Among other things, sections 14 and 17 provide that "the memorandum of association" must, in certain cases, and may in any, "be accompanied, when registered, by articles of association, signed by the subscribers to the memorandum of association, and prescribing such regulations for the company" as said subscribers "deem expedient:" and that said memorandum and articles, "if any, shall be delivered to the registrar of joint-stock companies, \* \* \* who shall retain and register the same." Section 18 provides, among other things, that upon the registration of the memorandum and articles "the registrar shall certify under his hand that the company is incorporated;" and "the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate, by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company \* \* \*"

From this it appears that the law of Great Britain authorized the incorporation of the plaintiff; and the next question is, was it ever organized thereunder?

Mr. Mackenzie testifies that Exhibit B is a true copy of the memorandum and articles of association of the plaintiff, compared by him with the originals on file in the office of the registrar of joint-stock companies for Scotland. The memorandum and articles of association, being deposited and registered in a public office, are public writings, and may be proved by a copy examined and compared with the originals by a witness who swears to its correctness. The evidence is sufficient that the Exhibit B is a true copy of the originals; and it appears therefrom that the proper number of persons, on April 21, 1876, duly signed a memorandum of association for the incorporation of "The Dundee Mortgage & Trust Investment Company, Limited," with a registered office in Scotland, for the purpose, among others, of "making advances of money, repayable with interest," on "mortgages and other liens of and over" real property in any of the United States, and the purchase of mortgages or funds therein.

Mr. Mackenzie also testifies that the certificate printed on page 23 of Exhibit B is a true copy of a certificate of incorporation given to the plaintiff by the registrar, pursuant to section 18 of "the companies' act," on May 2, 1876, and that Exhibit D, dated December 19, 1879, is an original certificate, so issued to the plaintiff, and in the custody of the witness, as its secretary. In the latter one it is certified that the plaintiff "was incorporated under the companies' acts, 1862 and

1867, as a limited company, on the second day of May, 1876," while in the copy it is stated that the plaintiff "is this day incorporated under the companies' acts, 1862 and 1867, and that it is a company limited by shares." The certificate of incorporation, when delivered to the plaintiff, became a private writing, in private custody, and cannot be proved, so long as it is in existence, by a copy, or otherwise than by the production of the original. It is not sufficient that the witness produces a paper, and swears that he has compared it with the original, and that it is a true copy thereof. The adverse party is entitled to an inspection of the original; but, as it is a private writing, in private custody, he cannot have this inspection unless it is produced before the examiner, and, when produced, the examiner may make a copy of it, and attach the same to the testimony of the witness, and return him the original, unless the case is one where the integrity of the latter is questioned, and its physical features are material to the inquiry.

Counsel for the defendants suggests that Exhibit D cannot be received as the certificate authorized by section 18 of the act, because he says it is a duplicate of a later date, so to speak, of the one of May 2, 1876, the original of which is not produced. No authority is cited on the point, and the statute is silent on the subject. But, considering the nature and purpose of the certificate, that it is given to the corporation simply as the convenient evidence of its existence and right to act as such, no reason occurs to me why the registrar may not, if he will, issue it in duplicate; and if he does, one of them is of the same force and effect as the other, for they are both originals. It may be very convenient, where, as in this case, a corporation is formed for the transaction of business in many parts of the world, to have the certificate in duplicate, or even more, so as to enable it to defend or assert its corporate character when and wherever it may be necessary. But it is not clear that these instruments are duplicates. It is true that while couched in different language, they are essentially the same. *Rapalje & L. Law Dict. "Duplicates."* They both state the fact that the plaintiff became a corporation, by the name assumed, under "The Companies' Act, 1862," on May 2, 1876. But, as some years appear to have elapsed between the date of the certificates, it may be more correct to characterize them as originals issued successively, but separately, on the same facts or transaction, than as duplicates, which implies, I think, simultaneous execution or origin. And, assuming this to be the fact, the force and effect of the second certificate as evidence of the fact stated therein, is not at all impaired by the circumstance that it was issued some time after the registry of the memorandum and articles. It is doubtless contemplated by the act that the registrar will issue the certificate as soon as the corporation is entitled to it. But there is nothing in the act or the circumstances of the case that makes its validity depend on the date of its issue. So far, at least, as third persons are concerned, it is immaterial when it issues, so that it is subsequent to the regis-

tration of the memorandum and articles of association by the registrar. But, speaking by the evidence, this is really the only certificate that ever was issued to the plaintiff. The attempt to prove the issue of one on May 2, 1876, failed. The original was not produced and the alleged copy is not competent evidence of the fact.

On the whole, my conclusion is that the plea in abatement is not proved. On the contrary, it satisfactorily appears plaintiff is a duly-organized corporation under the laws of Great Britain, with power and authority to take an assignment of these notes and mortgage, and to maintain this suit thereon. This defense is purely technical, and utterly without merit. It is admitted that the defendants have the legal right to make it, even if they should thereby succeed in defrauding the plaintiff out of this large sum of money. In the administration of justice by finite beings, according to finite laws, it must sometime happen that the wrong prevails. But happily, in this case, the attempt to escape the payment of an honest debt, on the ground set up in this plea, has so far come to naught.

---

### UNITED STATES v. MINOR.

(Circuit Court, D. California. May 13, 1884.)

#### PUBLIC LANDS—SETTING ASIDE PATENT FOR FRAUD—PERJURY AND FALSE TESTIMONY.

Perjury and false testimony in proceedings to obtain a patent to public land is not fraud extrinsic or collateral to the matter tried and determined in the land-office, and will not justify setting aside the patent at suit of the United States.

In Equity.

Before SAWYER and SABIN, JJ.

SAWYER, J. In July, 1883, this court decided the case of the *United States v. White*, in which the demurrer to the bill was sustained and the bill dismissed. That case presented the principal question decided for the first time, and was similar to this in all respects, except in that case it did not appear that any private party had acquired, or attempted to acquire, any right in the land patented. But as the United States are the only parties to the record, it is not perceived that the interests of adverse pre-emption claimants can affect the decision on the points determined. If that case was correctly decided, then the demurrer in this case must be sustained, for the reasons then given, and a copy of the opinion in *White's* case will be filed, as showing the grounds of the decision in this case. See 9 Sawyer. 126, and 17 Fed. Rep. 561.

I do not feel entirely certain that the doctrine established in *U. S.*



v. *Throckmorton*, 98 U. S. 68; *Vance v. Burbank*, 101 U. S. 519; and *Smelting Co. v. Kemp*, 104 U. S. 640, has not been carried too far. If the case of *White* and the present case are distinguishable from *Throckmorton's* case, it must be on the ground that the United States did not appear as a formal party by their attorney in this and in *White's* case and contest the claim made, and consequently did not have their day in court in such sense as to make the point *res adjudicata*. But the United States did not appear in the matter out of which the case of *Vance v. Burbank* arose. The question in both cases was investigated and decided by officers of the United States especially authorized to determine upon evidence the questions of fact in favor of or against the government, and parties claiming through the United States. The United States were thus represented by their own officers, empowered to determine the matter on their behalf. No complicity on the part of the officers is averred in this case. If the allegations of the bill be true, they have simply relied upon willfully false testimony, as in other cases decided by the courts upon perjured testimony; and the fraud is not in a matter extrinsic to the matter decided.

If the United States are bound, so far as their interests are concerned, it may possibly still be that any person who had acquired and still held a valid pre-emption right prior and superior to the right of the patentee would not be bound. If so, the legal title in that case has passed from the United States to the patentee, charged with the equitable right of the party having a better right, and he might maintain a bill in his own name to control the title for his own benefit, and that would seem to be the proper proceeding. If such a right could be enforced, it would be because the party having the better right is not bound to take notice of what is going on in the land-office, and he has not had an opportunity to be heard,—has not had his day in court. He would thus stand in a better position than the United States, because his right attached against the United States themselves as well as against the patentee before the proceedings for a patent were commenced; and his right, if the required conditions have been performed, could not be affected without legislation by any action of the land-office. He could not be affected by a proceeding to which he was not a party. As the proceedings in the land-office resulting in a patent are subsequent to the attaching of his right, he is not in privity with the United States in the subsequent proceedings for a patent. His right would be adverse to the patentee. But is he not bound to take notice of the proceedings in the land-office, resulting in a patent? If so, there does not appear to be any good reason why he should not be bound by them.

It may well be said that a pre-emptioner only takes such right as the statute gives him, and that those rights are taken subject to the methods appointed by the statute for ascertaining to whom a patent should issue, and to the issue of patents in the mode appointed;

that he can be entitled to only such notice as the statute itself provides; and that, upon this ground, the regular issue of a patent is conclusive. In this view it would not matter whether any notice is provided for or not. He would be in no better position than the United States.

The act of 1879 (1 Supp. 470) expressly requires the applicant for a pre-emption or homestead entry to file with the register of the land-office notice of his intention to prove up his claim, giving a description of the land, names of his witnesses, etc., and the register must give public notice of the same by publication in the nearest newspaper and by posting for 30 days before the final proofs can be made. Whatever the legal *status* of the case with respect to parties claiming prior rights may have been before, it may well be claimed that the proceedings under this act are in the nature of proceedings *in rem*, of which everybody is bound to take notice; and that parties claiming to have acquired a prior right have due notice, and, as well as the United States, are bound by the action of the land-office in regularly issuing a patent, in pursuance of the modes and forms prescribed by the statute. These observations are made for the purpose of suggesting the points for the consideration of the supreme court, rather than for the purpose of indicating the view adopted in deciding the case.

When the case of White and the three others disposed of at the same time were decided, that being the first time the precise main question arose, I was anxious to have these cases taken to the supreme court at once for an authoritative decision of the points involved, and supposed it would be done; but greatly to my disappointment it was found that the value of the property involved was not sufficient to give the supreme court jurisdiction. No case of the kind is likely to occur soon, involving property of the value of \$5,000. A quarter section of government land at the time of pre-emption is rarely worth so much. A number of bills of a similar character have since been filed in this court, and a multitude of others are likely to follow, if it is finally decided that the bill can be maintained. It is of the utmost importance, therefore, to the interests of justice, the stability of titles, and the peace of the community, that the questions presented be correctly and promptly settled. It is my present purpose to withhold the decision in all other cases presenting similar questions until this case is decided by the supreme court.

The question as to when a claim of this kind becomes stale so as to justify a court of equity in refusing to entertain a bill of the kind is also important. Courts ordinarily adopt the statutes of limitations by analogy as to the time when the claim should be deemed stale. There is no statute of limitations of the United States to furnish the analogy. If under section 721 of the Revised Statutes the statute of the state of California may be adopted, then a suit of the kind on the ground of fraud would be barred in three years in the case of a pri-

vate party. Thus, if a party having a prior right has lost it by the issuing of a patent upon perjured testimony, without his having appeared before the land-office to contest the right to a patent, and can maintain a bill to control the title for his use, it is necessary to file his bill within three years after discovering the fraud. But the bill, in this circuit at least, is never filed by the party instigating the proceeding to vacate a patent thus issued. The attorney general is induced to allow the suit to be brought by the United States under the sanction of his name and authority; the party procuring it to be brought giving a bond to the United States to secure the payment of the costs of the litigation. The management of the case is thereupon in fact, in practice, under the general supervision of the United States attorney for the district, intrusted to the private counsel of the party procuring the suit to be brought, and indemnifying the government. If the party in whose interest the suit is usually brought can thus use the name of the United States for his own purposes in a suit which he could and should bring in his own name, then he can evade the limitation, unless such a case should be deemed stale as to the United States under the same circumstances and conditions as when applicable to individuals. Long experience suggests that there is a strong tendency in parties to settle on the public lands, despoil them of their timber or valuable metals, and neither enter the lands themselves nor leave them in a condition for others to enter. If such parties finally lose the land by their willful delay or negligence they are entitled to little sympathy. It has more than once come to my knowledge, judicially, that pre-emption claims are often filed; the land despoiled of all that is valuable; the claims then abandoned; and the operation repeated on other lands.

This case, upon the allegations of the bill, affords an instance of unaccountable negligence and want of attention to what is going on around him on the part of Spence, in whose interest the suit appears to have been brought. According to the bill, Spence, on April 2, 1872, settled upon one 80 of the quarter section patented. The approved plats of survey were filed October 2, 1874. On December 3, 1874, Spence filed his pre-emption declaratory statement for 160 acres of land, including the 80 so occupied; erected a house and other improvements; and continued to reside thereon. On January 31, 1878, he transmuted his pre-emption into a homestead entry, and has since held as a homestead claimant. On April 5, 1880, he filed the necessary affidavit, and made the necessary proofs of his homestead claim, and thereby claimed to become the equitable owner of the land, and entitled to a patent. It further appears that defendant, Minor, on October 23, 1874, filed his declaratory statement for pre-emption claim to a quarter section embracing the 80 so settled upon by Spence in 1872, alleging a settlement on March 20, 1874. On June 23, 1875, he proved up his claim, paid for the land, and received his certificate of entry; and on January 6, 1876, he received

his patent. Thus, according to the bill, while Spence was living on the 80 acres claimed by him two and a half years after his settlement, and subsequently to his filing his own declaratory statement, Minor filed his declaratory statement to 80 acres of the same land, proved his claim, and procured his patent two years before Spence transmuted his pre-emption into a homestead claim, and more than four years before Spence made his proofs; and this suit was not instituted till more than three years after Spence finally proved up, and nearly seven years and a half after the patent was issued to Minor. Such delay under such circumstances it would seem ought to render the claim stale.

When relief is sought against a patentee of public lands on the suggestion and on behalf of private parties reasonable diligence should be required in seeking the relief, even in the name of the government, if that mode be admissible. If there is such a fraud practised on an adverse claimant as would justify a court in vacating the patent on a bill filed by the United States for his benefit there is such fraud as would authorize the court to charge the legal title with a trust on his behalf upon a bill filed by himself, and possibly, as we have suggested, the United States might be bound by the adjudication of the land-office in cases where a claimant of a prior right might not be thus bound. In all such cases in my judgment it would be far better to leave the parties to litigate their own rights in their own names than for the United States to assume the litigation.

When the United States, upon being indemnified for costs, files a bill to vacate a patent at the instance of an adverse claimant with the sanction and in the name of the attorney general, as attorney of record, the case assumes an apparent dignity and importance which do not properly belong to it, and which it would not otherwise possess. It would seem that if there is a duty imposed on the United States to bring the suit, that duty would impose upon them the corresponding incidental duty to pay the costs.

I apprehend that the lands in such cases as this, at the date of the fraudulent entries complained of, are rarely worth enough to make it an object to litigate, and that an increase in value arising from subsequent events or developments not anticipated at the date of the acts complained of, usually furnishes the incentive to litigation afterwards instituted. In such cases parties should be required to act promptly.

My associate with some hesitation dissents upon the points decided, and at the request of the United States attorney the points of opposition of opinion will be stated by the court. In the mean time, in accordance with the views indicated in the foregoing observations and in the opinion in White's case, the demurrer will be sustained, and the bill dismissed; and it is so ordered.

## HENDEE, Receiver, etc., v. CONNECTICUT &amp; P. R. R. Co.

*(Circuit Court, D. Vermont. March 8, 1886.)*

## NATIONAL BANK—JURISDICTION OF CIRCUIT COURT—ACT OF 1882—SUIT BY RECEIVER—INJUNCTION.

Plaintiff was appointed receiver of an insolvent national bank in Vermont, and obtained an order from the circuit court for the district of Vermont for the sale of certain bonds pledged to the bank as security for a debt due the bank by defendant railroad company in Canada, which brought suit in the Canadian court to recover the bonds, whereupon plaintiff filed a bill in the circuit court for the district of Vermont for an injunction against the further prosecution of the suit in Canada. *Held*, that the circuit court had jurisdiction, and that the injunction should be granted.

In Equity.

*Albert P. Cross*, for orator.

*John Young*, for defendant.

WHEELER, J. The Vermont National Bank of St. Albans had in its possession \$691,000 first mortgage bonds, and \$101,000 second mortgage bonds, of the Montreal, Portland & Boston Railroad in Canada, pledged to it to secure the payment of \$370,000 due to it, with accrued and accruing interest, and failed, and the orator was appointed its receiver by the comptroller of the currency, under the laws of the United States, and he took possession of its assets, including these bonds, pursuant to his appointment; and he has procured an order of this court, under the laws of the United States, for the sale of the bonds. The defendant claims these bonds, and has brought suit for them, against the orator, in the superior court of Lower Canada, for the province of Quebec, in the district of Montreal. The orator alleges these facts in his bill of complaint, and moves for a preliminary injunction against the further prosecution of the suit in Canada, and this cause has now been heard upon that motion. No answer has been filed, and the allegations of the bill are, for the purposes of this motion, to be taken as true.

The principal ground urged in opposition to the motion is the want of jurisdiction of this court over any suit between the orator and defendant to try the title to these bonds. No question is or could well be made but that this court had ample jurisdiction for that purpose prior to the act of congress of July 12, 1882. By that act it was provided that "the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations" should "be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun." 22 St. c. 290, p. 163, § 4. This court would have no jurisdiction of such a suit as this between a state bank, lo-

cated where this bank was, and the defendant, for they would be citizens of the same state, and there would be nothing in the subject-matter conferring jurisdiction; and it would have had no jurisdiction if this bank had continued business in its own right, and had brought this suit.

It is argued that the receiver has no greater rights than the bank, and merely represents it, and that, therefore, the jurisdiction is the same as and not other than it would have been if the bank, while doing business, had brought the suit. This argument appears well enough founded, to the extent that the receiver stands upon and represents merely the rights of the bank as to the matter in controversy. *Bank v. Kennedy*, 17 Wall. 19; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383. But this does not determine the full meaning of the act of 1882. The purpose of that act appears to be to put national banks, as such, in the same situation as state banks, for the purposes of suing and being sued. No state bank, nor other bank not a national bank, could be in the situation in which this bank is. It is wholly in the hands of the orator, as a receiver, for the purpose of having its affairs wound up, and is not doing and cannot do any business whatever anywhere. It was brought into this condition by proceedings under the laws of the United States. The orator was appointed to his position as receiver by an officer of the United States, and is himself an officer of the United States, and acts as such in bringing this suit. *Stanton v. Wilkeson*, 8 Ben. 357; *Price v. Abbott*, 17 Fed. Rep. 506. A suit in behalf of a corporation created by act of congress arises under the laws of the United States, although the cause of action itself is founded on the common law or other statutes. *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Hughes v. Northern Pac. Ry. Co.*, 18 Fed. Rep. 106; *Pacific R. R. Removal Cases*, 115 U. S. 1; S. C. 5 Sup. Ct. Rep. 1113. The right of the orator to sue arises in the same manner. He cannot proceed at all without invoking the aid of laws of the United States.

The act of 1882 appears to take away the right of the bank as such, but not to affect the right of the orator as receiver. He is a receiver to collect the assets, and pay over the money raised from them to the treasurer of the United States, subject to the order of the comptroller, for distribution among the creditors. In matters concerning the sale of property, concerning bad and doubtful debts, and, in some aspects, concerning the appointment of a receiver in the first instance, the courts of the United States have some jurisdiction, in addition to that of the comptroller. Rev. St. §§ 5234, 5237, 629, subd. 11.

The sale of property, and compounding bad and doubtful debts, is remitted to the order of a court of record of competent jurisdiction. That part of section 57 of the banking act of 1864 giving jurisdiction to any state, county, or municipal court having jurisdiction in similar cases was not brought into the Revised Statutes, but was dropped out when the rest of the section giving jurisdiction to the courts of the

United States within the district was brought into section 563, subd. 15, and 629, subd. 11. 13 St. at Large, 116.

The state courts appear to be left with the jurisdiction arising out of the ability to sue and be sued, and without power, over purely administrative proceedings, for the government of officers of the United States, under the laws of the United States. The receivership is an entire thing, provided for, controlled, and regulated by the laws of the United States through the comptroller and the courts of the United States within the district. The defendant is a citizen of the United States, within the district. The suit of the defendant, wholly without the jurisdiction of the receivership, to deprive the receiver of property within, would tend to defeat its object. Such suits are frequently restrained by injunction. High, Inj. §§ 59, 60; *Dehon v. Foster*, 4 Allen, 545.

Motion granted.

---

NORTON, Trustee, v. CITY OF DOVER.

SAME v. CITY OF PORTSMOUTH.

SAME v. CITY OF MANCHESTER.

SAME v. CITY OF CONCORD.

SAME v. CITY OF NASHUA.

(Circuit Court, D. New Hampshire. February 23, 1886.)

**NEW TRIAL—RELEASE AFTER VERDICT.**

Where there has been a release, in full, under seal, after a verdict in favor of defendant a motion for new trial, on the ground that the evidence in the former trial was false, will not be heard until the validity of the release is determined by a proper proceeding.

Motion for a New Trial.

*H. D. Hadlock*, for plaintiff.

*William L. Foster*, for defendants.

COLT, J. In the above cases brought by the same plaintiff against various defendants, it appears that since the trial the plaintiff has signed what purports to be a release, in full, under seal, in favor of the several defendants. The plaintiff contends that this release is void. Under these circumstances, however, the motion for a new trial must be postponed until the validity of the release is determined by a proper proceeding.

GELSHENEN, Assignee, etc., v. HARRIS and others.<sup>1</sup>

(Circuit Court, E. D. Wisconsin. February, 1886.)

SET-OFF AND COUNTER-CLAIM—DEMANDS NOT IN SAME RIGHT—MALICIOUS PROSECUTION OF SUIT BY ASSIGNEE FOR BENEFIT OF CREDITORS—REV. ST. WIS. § 2656.

In an action by an assignee for the benefit of creditors, appointed in another state, to recover the purchase price of goods sold by the insolvent to a merchant in Wisconsin, damages resulting from the malicious prosecution of a former suit for the same cause of action, before the money was due under the contract, cannot be made the subject of a counter-claim under Rev. St. Wis. 1878, § 2656.

At Law.

*Markham & Noyes*, for plaintiff.

*Flanders & Bottum*, for defendants.

DYER, J. The plaintiff sues to recover the amount of an alleged indebtedness for goods and merchandise sold in October, 1884, by the firm of Henry Levy & Son, of the city of New York, to the defendants, a firm doing business in Milwaukee under the name and style of L. Harris & Sons. The complaint alleges that on the fifteenth day of December, 1884, Levy & Son made a voluntary assignment of their property and assets for the benefit of creditors, under the laws of the state of New York, and that the plaintiff was constituted their assignee in the instrument of assignment, and, as such assignee, became vested with the demand in suit, and entitled to sue for and recover the amount thereof. The allegations of the complaint are admitted by the defendants, but they interpose a counter-claim, in which they allege that the goods and merchandise in question were sold to them on a credit of four months, from December 1, 1884; that before this credit expired the plaintiff brought an action against them in this court upon said demand; that the issue in that case was whether the demand was due when the action was commenced, and that on the trial of that issue there was a verdict for the defendants. It is further alleged that the prosecution of that suit was malicious, and without probable cause; that the defendants sustained damages by reason of the wrongful conduct of the plaintiff in the way of impairment of credit and cancellation of their orders for goods, and those damages they now seek to counter-claim against the plaintiff in this second action to recover the amount of the plaintiff's demand against them. This counter-claim is demurred to on various grounds, one of which is that the cause of action stated therein is not pleadable as a counter-claim against the plaintiff.

The statute of the state provides (section 2656, Rev. St. Wis.) that where the plaintiff is a non-resident of the state, any cause of action

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.



whatever, arising within the state and existing at the commencement of the action, may be the subject of a counter-claim in favor of the defendant, but the counter-claim must be one existing in favor of a defendant, and against a plaintiff, *between whom a several judgment might be had in the action.*

The plaintiff sues in a representative capacity. In legal effect, he sues as trustee of the creditors of Levy & Son. It is true that in the same capacity he instituted the previous suit; but if he brought that suit *maliciously*, he did so *in his own individual wrong*; and if any injury resulted to the defendants, it was an injury flowing from the individual act of the plaintiff in instituting and prosecuting the suit. If the cause of action set up in the counter-claim in fact exists, I think it is clearly one against Gelshenen personally, and not in his representative capacity, as assignee or trustee. The estate he represents is not chargeable with the consequences of a malicious wrong he may have committed, unless his *cestuis que trust* participated in the wrongful act. The demand, to recover which the plaintiff sues, is part of the estate of Levy & Son, and belongs to the creditors of that estate, and is being collected by the plaintiff, as assignee, for distribution among the creditors under the assignment.

The plaintiff had no authority, by virtue of his representative character, to incur the responsibility, or subject the estate to the liability, alleged in the counter-claim. If, in the prosecution of the previous action he was actuated by malice, and had no probable cause for bringing the suit, he committed a wrong personal to himself, and by which he, not his *cestuis que trust*, or the estate he represented, incurred liability to the defendants.

The proposition seems so clear that authorities are not needed in support of it. But upon this question, *Westfall v. Dungan*, 14 Ohio St. 276, is quite in point. It was there held that, in an action by executors for the recovery of the purchase money of land sold by them as executors, the purchaser could not avail himself of false and fraudulent representations made by the executors at the time of the sale, in respect to its subject-matter, by way of counter-claim; and that the purchaser's remedy, if any, was against the executors personally. Cases cited in the opinion of the court, and there commented on, also have strong application here.

If the wrong complained of by the defendants has in fact been done by the plaintiff, then the defendants ought to bring their action directly against Gelshenen, so that innocent parties who are interested in a speedy settlement of the estate will not be delayed by his wrongful conduct. This was the principle enforced in *George v. Bean*, 30 Miss. 151, where fraud was charged by a purchaser of property upon an administrator who had made the sale. The demands here involved are not in the same right. The counter-claim is not one in favor of defendants, and against a plaintiff, between whom a several judgment might be had in the action; and for the reasons stated,

which it has not seemed necessary to elaborate, I am clearly of opinion that the demurrer to the counter-claim should be sustained, and that the plaintiff should have judgment.

### UNITED STATES *v.* JOHNSON and others.

(Circuit Court, S. D. Georgia, E. D. November Term, 1885.)

#### 1. CONSPIRACY DEFINED.

A conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end.

#### 2. SAME—MERE PRESENCE WITHOUT PARTICIPATION.

A mere presence on the occasion of the conspiracy is not sufficient to make one guilty. The person charged must incite, procure, or encourage the act, but if a person joins the conspiracy at any time after it is formed, he becomes a conspirator, and the acts of the others become his by adoption.<sup>1</sup>

#### 3. CRIMINAL LAW—REASONABLE DOUBT.

A reasonable doubt is not a mere guess—a mere surmise—that one may not be guilty of what he is charged; it is a doubt that you may entertain, as reasonable men, after a thorough review and consideration of the evidence,—a doubt for which a good reason arising from the evidence can be given.<sup>1</sup>

#### 4. SAME—GOOD CHARACTER.

In cases of doubt, good character is essential as a means of defense; but, where the charge is absolutely proven, it can be of no avail.

#### 5. SAME—TRIAL—INSTRUCTION—SUMMING UP THE EVIDENCE.

It is the settled practice in the courts of the United States for the presiding judge to sum up the evidence, and to call the attention of the jury to its salient and important points. This is done for the assistance of the jury, and it is not intended in any manner to derogate from their right to find the facts as they believe them to have been proven.

#### 6. CONSPIRACY—NO VARIANCE.

Where the indictment charges that the officers of the government were fired upon while searching for an illicit distillery, and the proof shows that the *posse*, at the time of the firing, had just searched a swamp without success, and were on their way to a certain man to get information by which they hoped to continue the search with more success, there is no variance between the allegation in the indictment and the proof.

#### 7. SAME—NO VARIANCE.

Where the indictment charges that the conspiracy is to injure and hinder a certain deputy collector of internal revenue in the discharge of his duties, by firing at him, and the proof shows that the firing was directed at the *posse* to which he belonged, and of which he was in command, he being present, there is no variance.

Indictment under Rev. St. § 5518.

*S. A. Darnell*, U. S. Atty., and *Fleming G. Du Bignon*, Special Asst.

U. S. Atty., for the prosecution.

*Denmark & Adams* and *H. W. Carswell*, for the defense.

**SPEER, J.,** (*charging jury.*) In the regular and usual progress of investigations of this character, it now becomes my duty to give you,

<sup>1</sup>For discussion of the question of reasonable doubt, see *U. S. v. Searcy*, *ante*, 435, and note 442.

in charge, the law by which you are to be guided in your deliberations, and in view of which you are to find your verdict. Before proceeding to the discharge of this duty, I desire to say a word with regard to the importance of the functions you are now to perform. From the earliest period of our English-speaking race the method of trial by jury has been adopted for the settlement of those controversies which arise under the social system. It is incontestably the best, the fairest, the most just, the most effective method of determining all differences between the common members of society, and the issues which are formed between the government itself and the subjects or citizens of government. It is impossible to overestimate the importance of the work of the juror. To him is committed the duty to protect the oppressed from the oppressor, to redress the wrongs of those who have been wronged, to preserve the integrity of commercial transactions, to protect the title to property, to exonerate good name from the smirchings of slander, to stay the hand of the criminal,—in fact all of the questions upon which depend the enjoyment of that life, liberty, and property, to protect which society is organized, when such questions arise, are to be determined by “twelve good men in a box.” Each juror, therefore, gentlemen, will, I am sure, appreciate the supreme importance of a conscientious discharge of his duty, how completely he should divest his mind of every impression except that which arises from the consideration of the evidence adduced before him, and those rules of law which are to govern him in the consideration and determination of the case submitted.

The defendant here is charged with the commission of a serious offense,—he is charged with conspiracy. With what conspiracy? We turn to the laws of our government, and find that in section 5518 of the Revised Statutes it is provided:

“If two or more persons in any state or territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce, by like means, any officer of the United States to leave any state, district, or place where his duties as an officer are required to be performed; or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof; or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties,—shall be punished,” etc.

Now, the defendant is charged with the violation of that law. He is charged with one of the conspiracies specified in the statute.

It becomes important for the court to define to you what is a conspiracy. A conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end. The word “corrupt,” in the sense used, means “unlawful.” The intentment of this definition is that to conspire to do an unlawful act, or to conspire to accomplish a result which may in itself be lawful, but to do it in an unlawful manner, or an unlawful agree-

ment to accomplish an unlawful result, are conspiracies. The unlawful combination may be expressly proven, or it may be derivable from concerted action in itself unlawful. A mere presence on the occasion of the conspiracy is not sufficient to make a person guilty, but there must be some word or act; the person charged must incite, procure, or encourage the act. It is also true that, if one join the conspiracy at any time after the formation of the conspiracy, he becomes a conspirator, and the acts of the others become his by adoption.

Now, with what conspiracy is the defendant charged? It is to be observed, gentlemen, that, in the operation of the government, it is necessary to raise a large sum of money by taxation, to pay the interest on the public debt, to pay the running expenses of government, to provide a sinking fund with which to pay the public debt,—in other words, to support the government,—and this amount is raised in part by taxation upon spirituous liquors. Therefore the law provides that persons who make spirituous liquors shall pay a specific tax, and also a tax per gallon upon the amount which they make. That tax is considerable; but it is a tax provided by law, and law-abiding men who are willing to bear their shares of the burdens of government will pay the tax. It is true, however, that in certain portions of the country—in fact, all over the country—there are some men who seek to avoid payment of that tax. They try to make spirits without paying the specific tax to the government, or without paying any tax. It has been found necessary, therefore, in the effort to make such men pay their taxes, and to make every man to bear his burden of taxation, to commission certain officers with the duty of collecting the taxes, and with the further duty of preventing a violation of the laws upon this subject. Some of these officers are collectors of internal revenue, and others deputy collectors of internal revenue. The duty of these officers is extremely important, and it is absolutely necessary that they should be permitted to discharge that duty without molestation. In this case, it is charged that the deputy collector, Clements, was on his way to seize an illicit distillery,—a distillery such as that just referred to,—carried on without a compliance with the provisions of the law relating to taxes on spirituous liquors; that he was searching for the distillery with a *posse*; that the defendant, with other persons, conspired, by force, by firing upon the officer and *posse*, and by intimidation, to prevent him from the discharge of his duty, and to injure him on account of the discharge of that duty, and while in its discharge. The court charges you that the deputy collector, Clements, had the right, under the law, to proceed to search for the distillery, which he supposed to be illicit. It was not only his right, but it was his duty. It was his right to take with him a *posse*,—whomsoever he saw fit to summon. The court charges you, if the defendant, with others, conspired to injure him by force, or threaten him, or intimidate him, on account of the discharge of his duty, or to prevent him from its further discharge, he would be obnoxious to the provisions of

this statute; and if the proof is sufficient to satisfy you that was the fact, it is your duty to find him guilty of the charge as laid in the indictment.

In this, as in all criminal cases, the burden is upon the government to make out its charge of crime to the satisfaction of the jury, and beyond a reasonable doubt. Now, you must understand what is a reasonable doubt. It is not a mere guess—a mere surmise—that one may not be guilty of what is charged. It is a doubt that you may entertain, as reasonable men, after a thorough review and consideration of the evidence,—a doubt for which a good reason, arising from the evidence, can be given. If you find such a doubt, it is your duty to give the prisoner the fullest and amplest benefit of it, and acquit him; but this doubt must arise from the evidence, or the want of evidence.

In this case, the defendant Thomas Johnson puts his good character in evidence, to show that he did not commit this offense. In cases of doubt, good character is essential as a means of defense; but where the charge is absolutely proven, it can be of no avail. For instance, if you are satisfied from the evidence in this case that the witnesses for the government have spoken the truth with regard to the defendant; if you believe that their evidence is true, and it satisfies your mind that there was a conspiracy as charged; that the defendant was present on the occasion of the conspiracy referred to, and took part in it; and that he fired on the *posse* of the officers, or in the direction of those officers,—it would be your duty to find him guilty, although they may have proven the good character of the defendant. But should you have any doubt whether you will believe the witnesses for the government, or the witnesses for defense, then he is entitled to the benefit of his good character, and it should have due weight with you.

Now, the evidence relied upon in this case is the testimony of the witnesses under oath. A witness who has testified plainly and intelligently should be credited by the jury, unless he has been impeached in some of the methods provided by law. The supreme court of Georgia has gone to a very great length, in the rule which it has enunciated on this subject. It has used some very severe language about a jury who disregarded the plain testimony of an unimpeached witness. A witness may be impeached by proof of general bad character. There is no such proof offered here, either as to the government's witnesses, or the defendant's witnesses. He may be impeached by disproving the facts testified to by him. You are to determine whether the facts testified to have been disproved. He may be impeached by contradictory statements in matters material to the issue. The witness may not be impeached unless the contradictions are matters material to the issue. Of course, it is the province and duty of the jury to examine, in every way, the evidence that has been submitted. The interest of the witness, the impartiality,

and the opportunities of knowing the facts are all proper matters for the consideration of the jury.

It is the settled practice in the courts of the United States for the presiding judge to sum up the evidence, and to call the attention of the jury to its salient and important points. This is done for the assistance of the jury, and is not intended in any manner to derogate from their right to find the facts as they believe them to have been proven. In pursuance of this practice, I will briefly call your attention to the evidence. The witness Clements, the deputy-collector, testified that, in company with the party with whom he was acting, on the twenty-second day of October last, he went into Montgomery county for the purpose of searching for a distillery; that they searched a swamp called "Johnson's Bay." Not finding that still there, they started to the house of a man of the name of Pritchard, in order to get further information in regard to the distillery, and witness stated that it was with the purpose of resuming the search. He testified he had to pass a place known as "McBride's Store." This is one of those ordinary country stores situated at the junction of two roads,— "in the fork of the road," to use a familiar term. The back door opens towards the right-hand fork, in the direction in which the *posse* of Mr. Clements was going; and the front of the house is on the other fork. It was the purpose of Mr. Clements to go the right-hand road, which led by the back door, and he testified that, as he approached the door, he saw some parties standing there. When he came down nearer, one of them ran out, and said, "Who are you?" Another ran a little to the left, and they both fired upon the *posse*. He saw the first man who fired. He knew him, and identifies him as the prisoner Johnson. He did not recognize the other parties, but swears positively to the identity of Johnson. He testifies that when the firing began, that it caused his horse to jump, to turn his buggy over, and that threw him out of the buggy and rendered him unconscious. He testifies that many shots were fired, and his horse was wounded.

The witness Rose testifies substantially to the same state of facts. The witness Wall also substantially corroborates Clements. I am not sure that Mr. Wall testified that he recognized Johnson,—the jury will remember. The witness Ryals identified Johnson, and states that he recognized him. The witness McBride testified that he was awakened by some person trying to gain admittance to the store; that presently the defendant came through the window, and Johnson said to him, "The woods are full of marshals." Presently the door was opened by McBride, and Carmichael and Mozo came through the door. Carmichael came through with two guns, which he leaned against the house in the room near the door. Mozo had something in his hand. Witness didn't know whether it was a gun or not. Johnson came through the window without a gun. They asked for something to eat, and witness provided them with some salmon and oysters. They ate one can of oysters, and witness was opening another, when,

about that time, a remark was made by Carmichael. I believe the exact words of Carmichael were, "By God, they are coming." That defendant ran out of the back door, followed by Carmichael; that witness himself followed to the back door, and when he went through the back room he saw the guns were gone that Carmichael had placed there,—two guns. Witness didn't know who took them, and after they went out the firing began instantly outside, and witness knew no more about it. The testimony further, by several witnesses, is that a mule driven by Mr. Wall, one of this party, was wounded; the testimony being that the shots struck in a slanting direction. There was some testimony further, to the effect that there was something like wadding in the dash-board of Wall's buggy the next day, and there was much testimony to the effect that there were balls and shot imbedded in the church, in the probable or possible line of five of these parties, and in firing distance. That is about the testimony for the government to which it is proper for the court to call your attention. Of course, there was further evidence, but the court has called your attention to the main points in the evidence.

The testimony for the defendant now merits our consideration. Johnson testifies himself that that night he went to Long Pond, which it seems is a little village in Montgomery county, for the purpose of having a business transaction with Mr. Wells; that, when he had transacted his business, a young man named Hulsey desired to speak to him on some matter, and for that purpose they walked off from the Wells store, where they were standing, about 100 yards. While down there talking, they saw some parties in the woods, who at first they did not distinguish. One of this party asked who they were, and the reply was given, "Johnson and Hulsey." The party came up, when it appeared Carmichael was one of them. Carmichael said that the woods were full of marshals, and then Carmichael spoke of Mozo, who also came up, and Carmichael said there is that d—d Mozo now. He also said that if Mozo did not tell him where these marshals were, he would break his gun over his head. Johnson states that he got Carmichael quieted, and then Mozo and he went to the store, and got through the window, and woke up McBride, and told him to give them something to eat; that while they were eating, something was heard coming, and Carmichael made the remark, "There they are coming," and ran out; and Johnson ran after him, as he states, for the purpose of preventing him from firing. He states that there was some one outside who said, "They are coming," and Carmichael ran through the back door, and Johnson followed him, for the purpose of preventing him from the execution of his purpose; but when he failed to do so, he (Johnson) went around the corner, and met a man named Williams, and he and Williams left together. Williams testifies to the firing. Johnson came around the corner of the store, and told him he had better get away. The parties firing were drunk, and might shoot him. Williams and Johnson then

walked off together. Hulsey testified that he walked away some 100 yards with Johnson, and, after Carmichael and Mozo came up, Hulsey went home and went to bed, and afterwards heard the firing, and looked out of the window, and saw a part of it.

Now, gentlemen, you have the testimony,—the material evidence,—the more important portions of it. You are the judges whether or not you will give your credence to the government's or the defendant's witnesses. The witness McBride says that defendant left the store with Carmichael,—whether to prevent him from shooting or not, you are to determine. You are to determine whether you will accredit the witness McBride or believe the defendant. Another witness whose testimony has been referred to is the witness Carter. He testifies that he saw some parties leaving the place where the shooting was done. Immediately after, he heard the shooting, and was attracted by it. These parties were three in number, and one a little in advance, and his impression was that it was Mozo; and one of the parties said to the first, "Tom, did you hit?" or "Tom, are you hit?" He first said, "Tom, Tom;" and the answer was given, and then the witness states one of them said, "Did you hit?" or "Are you hit?" and the answer was, "Yes." He did not distinguish any of the parties positively, and did not distinguish the first, but thought he recognized Mozo. They were walking rapidly. This is the evidence for the government. If you believe the testimony of the witness Williams, you should acquit; but if you believe the testimony of Clements, Ryals, or Rose, who were there that night, you should convict. If you believe the testimony of defendant, Williams, and Hulsey, you should acquit; and if you have any reasonable doubt, which arises from the evidence, or from the want of evidence, which you should credit,—such a doubt as the court has already given you the definition of,—you should, of course, give the defendant the benefit of that doubt, and acquit him.

Something has been said about a technical failure on the part of the government to support its case, because it is insisted there is a variance between the allegations and the proof; the allegation being that the officer was in the act of searching for the distillery at that time, and the proof going to show, it is said, that he had abandoned the search for that night. The court charges you that the entire trip was a search for the distillery, if you believe they started out, in the first instance, to find the distillery, and that they had no other purpose. If, however, you believe that, at the time of the firing, they had permanently abandoned, and had no idea of resuming the search for the still, there would be a variance between the allegation and proof, and it would be your duty to acquit; but if you believe that they abandoned it simply for the night, and intended to continue the search in the morning, they would still be, in contemplation of law, in the act of searching, and it would be your duty to disregard this argument.



Something has been said about a failure to prove that the defendant shot at Clements. I charge you that, whether he shot at Clements or not, if he conspired with others to shoot at the party to which Clements belonged, he being present, with the purpose of injuring them, or any member who was engaged, under the direction of Clements, in the discharge of his official duty, he would be guilty of the offense charged in the indictment.

It is also insisted that, from the evidence, these parties did not intend to hurt the officers. Whether they intended to hurt the officers or not, if they fired at them to prevent or hinder them from the discharge of their duty; or if, so conspiring, it be true, as alleged, that he attempted to injure the property of the officer while in the discharge of his duty, in order to prevent him from the discharge thereof,—it would be material, under the terms of this indictment, and a violation of the statute.

The counsel for the defendant has requested the court to charge you, and the court charges you accordingly:

"(1) Four of the counts in the indictment charge that the defendant, with other parties, conspired and confederated for the purpose of interfering with the officer in the discharge of his duty; and the means of interference specified in four counts are that these conspirators shot at Clements with deadly weapons. One of the counts specifies, as the means used, that the conspirators shot at the horse of Clements. All of the counts charge that the officer was at the time searching for a still. In order to convict, one of these counts must be proved to your satisfaction as laid."

That is true, gentlemen, under the qualifications already given you in charge.

"(2) If you believe from the testimony of the government's witnesses that the theory of the prosecution is that the means used was the shooting at Clements with a deadly weapon, you cannot convict, unless satisfied beyond a reasonable doubt that Johnson was a party to this shooting at Clements."

That is good law, and the court gives it you in charge.

"(3) The specific question before you is not whether or not any particular witness is guilty of perjury, although the credibility or accuracy of a witness may be involved incidentally. The question is, in view of all the evidence and all the circumstances of the case, is the defendant guilty of the offense charged, beyond a reasonable doubt?"

"(4) There are other ways of impeaching witnesses, in addition to proof of general bad character. There are other ways,—such as proof of contradictory statements."

Counsel for the United States request the court to charge that if Clements, the deputy collector, was, at the time of the assault, before that time, or intended to be afterwards, engaged in searching for a distillery, and that if the enterprise upon which he had entered had not been fully ended and abandoned, then, in contemplation of law, the search for the distillery was still in progress; that it is not necessary for the United States to prove that Clements was, at the particular moment of the assault, searching for a distillery; that the phrase "searching for a distillery" must be accepted as having a con-

tinuous application to the whole enterprise, when it appears that was the purpose for which the same was entered upon; nor was it necessary that Clements should have had a warrant to make his enterprise legal and under the protection of the statute in such case made and provided. The court also gives you that request.

I have referred to the fact that the crime alleged was a very serious offense, but this must not prejudice you against the prisoner. It becomes all the more important that you should consider well the testimony before you bring in a verdict. The citizens must respect the laws, and, if you believe, from the evidence, that this law has been violated as alleged, you should find the defendant guilty; if not, you should find him not guilty.

No government can exist unless the officers who seek to enforce its laws are protected. If such conduct as that described in this indictment is permitted to go unwhipt of justice, the community will be demoralized; every man will be affected; the prosperity of the country shaken; lawlessness will prevail on all sides. While this is true, you should be especially careful not to confuse the importance of the accusation with the question of the guilt or innocence of the prisoner. No matter how serious is the charge against him, he is entitled to the same even-handed justice from you that he might expect in the most trivial and inconsequential affair. The court adjures you to be perfectly impartial between this government and the accused, and will now commit the case to your hands.

The jury returned a verdict of guilty, and a motion for a new trial was made and overruled.

---

### UNITED STATES *v.* WILLIAMSON.

*(District Court, E. D. Virginia. February, 1886.)*

#### POSTAL LAWS—PROSECUTION OF POSTMASTER FOR USING STAMPS IN PURCHASE OF GOODS.

In prosecutions of postmasters for using postage stamps in the purchase of merchandise, under chapter 259, 20 St. at Large, p. 141, the government must prove that the stamps so used had been received by the postmaster from the post-office department.

#### Indictment for Violation of Postal Laws.

Chapter 259 of volume 20 of the United States Statutes at Large, p. 141, declares that no postmaster intrusted with the sale or custody of postage stamps shall use or dispose of *them* in the payment of debts or purchase of merchandise. The indictment in this case charged that the defendant was United States postmaster at Tappahannock, Virginia, "intrusted with the sale and custody of postage stamps," and did at, on, etc., "unlawfully use and dispose of one hundred [one-

cent] and one thousand [two-cent] postage stamps in the purchase of merchandise, and did unlawfully sell and dispose of said postage stamps otherwise than as provided by law," etc. The case was given to the jury, and proof made that \$21 in value of postal one and two cent stamps were, on a day named, mailed in a letter by the defendant to a house in Baltimore, in payment for merchandise ordered by the postmaster in the same letter. It was not proved that the stamps thus mailed for the purpose mentioned were stamps which the defendant had received, as postmaster, from the government of the United States, "intrusted" to him in his official capacity. There was strong ground for *inferring* that the stamps shown in evidence, from their fresh condition and from being still in the original sheets, had in point of fact been received by the defendant from government as postmaster; but there was no positive evidence of their identity, and of their having been so obtained. When the prosecution had rested their case, it was moved by defendant's counsel that the jury be instructed that, in order to conviction, it was necessary that the government should prove that the stamps used as charged in the indictment had been intrusted to the defendant by the government, in his character as postmaster.

*J. C. Gibson*, U. S. Atty., and *James Lyons*, Asst. U. S. Atty., for the prosecution.

*Edmund Waddill*, for the defense.

HUGHES, J., held that there must be proof that the stamps used had been received by the postmaster officially from the government. The phrase "of them," employed in the statute, confined its operations to stamps "intrusted" to the postmaster; and unless the indictment charged, and the evidence proved, that the stamps used by the postmaster for the purchase of merchandise had been received by him from the government, there could be no conviction. The law ought to have forbidden postmasters from using any stamps whatever, from whatever source procured, in payment of debts and the purchase of merchandise.

Verdict of not guilty.

CELLULOID MANUF'G CO. v. AMERICAN ZYLONITE Co. and others.<sup>1</sup>

(Circuit Court, S. D. New York. March 5, 1886.)

## 1. PATENTS FOR INVENTIONS—CELLULOID.

Letters patent No. 156,353, of October 27, 1874, to John W. Hyatt and Isaiah S. Hyatt, assignors to the Celluloid Manufacturing Company, sustained against the defenses of want of novelty, non-patentability, and public use.

## 2. SAME—UTILITY OF THE INVENTION.

To the process set forth in this patent, and the knowledge and skill which grew out of an acquaintance with it, is due the present commercial success of zylonite or celluloid as an article which can be devoted to a very great variety of uses.

## In Equity.

*Frederic H. Betts and William D. Shipman, for complainant.*

*Horace M. Ruggles and Benjamin F. Thurston, for defendants.*

SHIPMAN, J. This is a bill in equity to restrain the defendants from the alleged infringement of letters patent No. 156,353, granted October 27, 1874, to John W. Hyatt and Isaiah S. Hyatt, assignors to the complainant, for "an improvement in the manufacture of celluloid." The defenses are want of novelty, non-patentability, and public use, in the United States, of the alleged improvement for more than two years before the application for the letters patent, with the consent and allowance of the patentees. Under the defense of want of novelty, the patents which the defendants introduced in evidence and relied upon were three American letters patent to Daniel Spill: No. 91,377, dated June 15, 1869; No. 97,454, dated November 30, 1869; and No. 101,175, dated March 22, 1870.

An understanding of the case depends materially upon a knowledge of the state of the art at the date of the patent in suit, and I therefore give a brief history of the article which is now known as "zylonite" or "celluloid." Pyroxyline or gun-cotton, "an explosive obtained by immersing vegetable fiber in nitric and sulphuric acids, and subsequent drying," (Knight, Mech. Dict.,) was invented by Schonbein in 1846. The great anticipations which were originally had of the invention, as a substitute for gunpowder, were never realized. It proved to be too dangerous and uncertain to be used as an explosive material. In 1847 or 1848, Dr. Maynard, of Boston, discovered that it could be dissolved in alcohol and ether, and used as a vehicle for medicines, and as a substitute for sticking plaster, and gave the name "collodion" to this solution. Passing by the introduction of collodion by Frederick Scott Archer, in 1851, to the art of photography, Alexander Parkes, of England, discovered, in 1855, that a solution of pyroxyline, mixed with other articles, could be

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

made, after the solvent was evaporated, into a substance having the qualities of ivory or of horn, and which could be easily moulded or worked and receive any desired color. Mr. Parkes suggested a number of solvents, took out a number of patents, entered vigorously upon the manufacture of the material, which he called "Parkesine," and made exhibitions of the various articles into which it was wrought; but from some cause his enterprise lacked success, and was abandoned in 1867.

The general question of solvents lay at the bottom of the practical difficulties in the manufacture. After the pyroxyline had been dissolved, the problem was how to get rid of the solvent, so that the conversion of the dissolved material from a semi-fluid state into a hard substance, or a substance that would become hard, was practicable. Evaporation was the method which was used. In 1869, Mr. Daniel Spill, of England, received the American patent No. 97,454, which fairly represents the extent of information which the public or any individual had at that time on the question of pyroxyline solvents. His subsequent patent, No. 101,175, also represents the point which had been reached, at its date in 1870, in the process of transforming dissolved pyroxyline into zylonite, the name which Mr. Spill gave to the completed article. In No. 91,377, dated June 15, 1869, he had described an invention relating to the production of compounds containing zyloidine which, in "the admixture of zyloidine with animal, fish, vegetable, or mineral oils, oxidized or otherwise, such, for example, as vegetable or mineral tar, lard oil, cod-liver oil, linseed oil, or heavy coal oils, or with mixtures of the same, together with the admixture of other ingredients, such as paraffine, camphor, resins, fat, wax, India rubber, gutta-percha, or balata gum, or mixtures of the same, so as to produce a material or materials which may be employed, either alone or in conjunction with pigments or other inert bodies, for the production of a compound which may be applied for useful purposes in the arts, such as for moulding into forms, or for rolling into sheets or otherwise, for spreading either upon or between fabrics, or otherwise, or for the coating of metals and wood." No. 97,454 related, the patentee stated in his specification, "to the preparation and use of certain solvents of zyloidine, and which differ from the ordinary or known solvents of zyloidine, in that those *menstrua* which are employed are not necessarily in themselves solvents of zyloidine, but become so by the addition of the bodies, compounds, or substances herein referred to." The inventions consisted in the employment, as a solvent of zyloidine, of one of seven described combinations of ingredients, and "in the employment of any two or more of any of the before-mentioned solvents, either in the proportion of about equal parts, or in other proportions." The second solvent which the patentee described was "camphor or camphor oil, or mixtures of the same, in conjunction with alcohol or spirits of wine, the same to be employed in about equal proportions." It has been de-

cided by Mr. Justice BLATCHFORD that the public had been previously informed by Mr. Parkes that dehydrated or strong alcohol was of itself a solvent of pyroxyline, and was instructed to mix it with camphor as such solvent, and that, therefore, Mr. Spill's improvement, so far as the use of camphor and alcohol was concerned, was not patentable. *Spill v. Celluloid Manuf'g Co.*, 22 Blatchf. 441; S. C. 21 Fed. Rep. 631.

This somewhat vague patent was followed by No. 101,175, which was for a method of converting vegetable fibers into zyloidine, for a process of bleaching, and for a process of dyeing it, and for a mode of preparing it for spreading upon surfaces of fabrics in a semi-fluid condition, and for a process of treating it so as to bring it to a nearly dry condition for the production of solid articles. From the patent it appears that Spill's practice was to dissolve one part of zyloidine in from five to twelve parts of solvents,—five parts would produce a stiff paste,—to which solution pigments were added, and the paste was then "strained through a fine sieve, under pressure, to remove any mechanical impurities, after which operation it is in a fit condition for spreading upon surfaces or fabrics in a semi-fluid condition." When the compound was to be prepared for the production of solid articles, the paste, after it had been strained, was placed in an air-tight chamber provided with mechanical stirrers, the chamber being "in connection with a condenser and a reservoir, and also, by preference, being in connection with an exhausting or vacuum-producing apparatus." Heat being applied to the mixing apparatus, and the agitator being set in motion, the solvents are evaporated and conveyed away to the condenser for future use. It thus appears that Mr. Spill first made a paste, then strained the solution to remove mechanical impurities or undissolved particles of zyloidine; and, to make solid articles, the excess of volatile solvents was then evaporated in an air-tight machine connected with a condenser for saving such solvents. By this process, zylonite was made at and prior to 1874. The article had defects incident to its method of manufacture. By reason of an imperfect admixture of zyloidine, and an unnecessary amount of liquid solvent, there remained lumpy particles of undissolved fiber; the excess of liquid must be mechanically evaporated; and, notwithstanding the evaporation, the solid article was too soft unless made hard and strong by the admixture of some other substance.

In 1870, John W. Hyatt, Jr., and Isaiah S. Hyatt made the important discovery that camphor alone, when mixed with pyroxyline, the mass being treated to from 150 deg. to 200 deg. Fahrenheit, and subjected to heavy pressure, was a solvent of pyroxyline, the heat vaporizing or liquifying the camphor. The discovery and the new resulting process of making celluloid are described in the first reissue of No. 105,338, known as reissue 5,926, dated June 23, 1874, as follows:

"In the practice of our invention, we prepare pyroxyline by grinding it in water to a fine pulp, in a machine such as is used in grinding paper pulp. We strain off the water as far as practicable, and then subject this pulp to a powerful pressure,—for example, in a perforated vessel,—to further expel the aqueous moisture, and to bring it to a comparatively solid and dry state, yet still retaining sufficient moisture to prevent it from burning in the further stages of the process. We comminute gum-camphor by grinding it in water, or, preferably, by pounding or rolling it, and thoroughly incorporate, with the pyroxyline pulp in the condition last above described, this finely comminuted camphor, in about the proportion of one part, by weight, of camphor to two parts, by weight, of the pyroxyline in the pulp. These proportions may, however, be somewhat varied with good results. The moisture in the pulp serves to counteract any tendency of the camphor to prematurely develop its converting power under any stimulus incident to its being incorporated with the pulp, or to the further stages of the process. With the camphor we also thoroughly incorporate, with the pulp, any pigments, coloring matter, or other materials that may be adapted to the requirements of the articles into which the product is to be manufactured. The camphor, or camphor and other ingredients, having been thus thoroughly mixed with the pulp, we next subject the mass to a powerful pressure, in order to expel the remaining aqueous moisture, and thereby not only dry the mixture, but force the camphor into more intimate contact with the pyroxyline throughout the mass, so that every atom of the camphor shall be in condition and place to exert its utmost converting power as developed. The dried and compressed mass is next placed in a suitable mould or vessel open at the top, and into this open top is fitted a platen or plunger. The vessel is then placed in a hydraulic or other powerful press, and a heavy pressure, applied to the platen or plunger, is brought to bear upon the mixture, which, while thus under pressure, is heated up by steam or other convenient means, to a temperature of from 150 deg. to 300 deg., varying according to the quantity of the mixture, and the mixture is kept at this temperature and under this pressure until the converting power of the camphor shall have been exerted upon the pyroxyline throughout the mass; the heat developing the latent converting power of the camphor, and the camphor exerting this converting power actively upon every atom of the pyroxyline, with which the pressure maintains it in close contact. The process of transformation is rapidly effected, and is completed almost as soon as the mass attains its maximum temperature, the resulting product being a homogeneous product, solidified collodion, or collodion compound having the qualities or properties hereinbefore specified. This product, as it comes from the press, is of a consistency resembling that of sole-leather, but upon exposure to the atmosphere it hardens, by reason of a slight evaporation of the camphor. The ultimate product includes, however, a large proportion of the camphor as a permanent accretion to the mass, which accretion is not only a great gain over the use of ether, alcohol, or other solutions or volatile solvents, which would be entirely expelled or lost, but by its presence gives the solidified collodion or compound the new capability of being again rendered plastic by heat, and remolded into any desired form or shape, without requiring the use of solutions or volatile solvents, or the addition of fusible gums, as heretofore."

The discovery that camphor was a solvent of pyroxyline without the admixture of a liquid, though chemically important, was not practically available in the art, by reason of the danger of explosion of the pyroxyline when the camphor was heated to a melting point. The patentees therefore devoted themselves, with the knowledge they had gained that liquid solvents could be dispensed with, to the discovery

of a process which should be safe, and yet possess the mechanical advantages in which the process of No. 5,928 was the pioneer. The invention described in the patent in suit was the result. The specification describes the invention as follows:

"In our reissued letters patent No. 5,928, granted June 23, 1874, camphor is set forth as a solvent of pyroxyline when the same is subjected to intimate mixture, and then to heat and pressure. Our present invention is made for lessening the quantity of camphor or equivalent solvent made use of; also the degree of heat required in the manufacture of celluloid. We prepare a compound pulp composed of pyroxyline, gum-camphor, etc., as described in the said above-named reissued letters patent, but in different proportions, the proportions suited to this new process being about one hundred (100) parts of dry pyroxyline, and from twenty-five (25) to forty (40) parts of gum-camphor, (varying with the consistency required in the finished product,) together with such coloring or other material as may be desired. When these ingredients are thoroughly intermixed, as set forth in such reissued letters patent, and the aqueous moisture expelled therefrom, which may be advantageously accomplished by the plan set forth in our letters patent of November 19, 1872, and numbered 133,229, from twenty (20) to forty (40) per cent. of alcohol is added, and the whole mass kept within a closed vessel until the alcohol is evenly diffused throughout all its parts, the proportions named in the reissued letters patent referred to being one hundred parts of dry pyroxyline to fifty parts of gum-camphor. After this even diffusion the mass is well masticated between rollers heated to 135 deg. Fahrenheit. The particles of pyroxyline and other materials, such as coloring matter, are brought intimately into contact with the camphor by the action of the alcohol and the mastication, and a semi-transformation takes place, and the material is in a better condition for the final heating and converting process, so that from fifty to seventy-five degrees less heat is required to complete the transformation of the pyroxyline and solvents into celluloid than is required where no alcohol is used. Nitrous ether and some other solvents of gum-camphor may be substituted for alcohol in this process."

The claim is as follows:

"The process herein set forth of manufacturing celluloid by the addition to the mass, composed of pyroxyline and camphor, of a solvent of camphor, in about the proportion set forth, and previous to mastication, heat, and pressure."

To this process, and to the knowledge and skill which grew out of an acquaintance with it, is due the present commercial success of zylonite or celluloid as an article which can be devoted to a very great variety of uses.

The question of prime importance in the case is as to the patentability of the process. The plaintiff insists that reissue 5,928 disclosed an invention which is admitted to have been novel and patentable, which broke the control theretofore held by liquid solvents, relied upon heat and pressure to develop the action of the solid solvent, and pointed the way towards success in the manufacture of solid celluloid, and that the patent in suit is an improvement upon the process of No. 5,928, and is therefore patentable. The defendants say that the patent in suit is simply a return to the well-known spirits of camphor solvents, and that, if the time of the application of the al-



cohol to the camphor is not an immaterial matter, yet, when it is once known that spirits of camphor are a solvent, there is nothing patentable in the order in which the liquid or camphor is introduced into the tub, but the changes or modifications in the manner of applying the solvent are only a carrying forward of the original thought, which does not constitute invention.

It is true that it was well known in 1874 that spirits of camphor were a solvent of pyroxyline, and a mode in which the solvent could be applied was well known, and if the alleged invention consisted merely in a new and different method of mixing the spirits of camphor with the pyroxyline, whereby a better result was produced, it would contain nothing patentable. But the invention had a wider scope. It must be noted that the question is not whether the process was a patentable improvement over what was practiced in 1882 under the name of the Spill process, but whether it was an invention, in view of the state of the art in 1874. It was for an improved process whereby, instead of mixing a solid and a liquid, and straining the mass to remove undissolved particles, and evaporating the liquid in an air-tight condenser, the invention mixed two solids and added a liquid; then, having pressed out the moisture and masticated the compound in rolls, they relied upon heat and pressure to effect or complete the transformation with solid celluloid, the pressure being that described, and the degree of heat being less than that described, in No. 5,928. The discussion in regard to these processes should not be confined to a comparison between the different methods of introducing the liquid solvent to the mixture, but the difference extends to the respective methods subsequently used in the process of transformation.

It cannot be denied that No. 5,928 was clearly a new and patentable process, and that it radically differed from its predecessors. I think it is plain that the patent in suit is not an abandonment of No. 5,928, and a mere return to the old liquid solvent process, which consisted in first dissolving the solid pyroxyline in a large amount of liquid, and then evaporating the solvent, but was a retention of the new process of perfect admixture of two solids, and then a transformation by heat and pressure, except as modified by the introduction of alcohol to the mixture of pyroxyline and dry camphor. Neither was the process of the patent in suit a mere change of proportions from those given in the Spill formula.

The defendant corporation has used from time to time, since its organization in 1882, the patented process, unless the fact that it mixes dry camphor with pyroxyline, rendered abnormally dry, and then adds the alcohol, and does not subject the mixture to pressure for the purpose of expelling dampness, constitutes a departure from the process described in the patent. Each method starts with wet pyroxyline. Hyatt brings the pulp in the first place to a comparatively dry state, adds the camphor, and then expels the remaining

moisture. The defendants made the pulp abnormally dry in the first instance. They omit no step which the patent describes, and there is no substantial difference in the methods in which the process is used.

The defendants also say that the process was publicly used for more than two years before the date of the application for a patent. During the experiments which resulted in the discovery of the patented process, some poor dental plates were sold. Without going carefully into an examination of the testimony, the case is within the principles announced in *Pitts v. Hall*, 2 Blatchf. 229, and *Elizabeth v. Pavement Co.*, 97 U. S. 126.

Let there be a decree for an injunction and an accounting.

---

RHEUBOTTOM and another *v.* LOOMER and others.<sup>1</sup>

(Circuit Court, D. Connecticut. March 5, 1886.)

PATENTS FOR INVENTIONS—PRIOR USE.

It was clearly proven in this case that the devices covered by patent No. 105,124, granted to Charles E. Pratt and others, July 5, 1870, for an improvement in hoop-skirts, had been manufactured and sold by others in 1863 or 1864, and hence the bill was dismissed.

In Equity.

*J. E. Hindon Hyde* and *Frederic H. Betts*, for plaintiffs.

*William B. Wooster*, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement of letters patent No. 105,124, granted to Charles E. Pratt and others, July 5, 1870, for an improvement in hoop-skirts. The patent is now owned by the complainants. The inventor says in the specification of the patent that the invention consisted "in the employment of one or more bracing hoops attached to the back near the top, and springing around to the front, and downward to a point about the height of the knees of the wearer, as hereinafter described, in substitution of a large number of the concentric hoops, which, by this improvement, may be omitted from a short distance below the waist to the lower portion of the skirt," and thus either the necessity of sitting upon them, or of their throwing up the front part of the dress, when the wearer sits down, may be avoided. The only defense is want of novelty.

It is clearly proved that, during a period of about three months, in the year 1863 or 1864, the firm of W. E. Burlock & Co., of Birmingham, Connecticut, made and sold from 50 dozen to 100 dozen hoop-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

skirts containing the patented improvement, and that in the year 1865 Townsend, Lattin & Co., of Bridgeport, Connecticut, made and sold a few such skirts. John R. Lattin was the superintendent of the factory of each of these firms, and was a member of Townsend, Lattin & Co. His testimony, and that of six other witnesses, in regard to the manufacture by W. E. Burlock & Co. established the fact beyond reasonable doubt that that firm made and sold these skirts for a few months in one of the years named. The testimony in opposition seems to me to be feeble. The manufacture by Townsend, Lattin & Co. was very small, but undoubtedly existed. It is also proved that S. A. Downs & Co., also of Birmingham, made and sold such skirts in 1864, and that Robert May, the successor of said firm, continued to make and sell the same article for a few years after 1865.

Considerable testimony was introduced by the defendants in regard to the manufacture and sale of these skirts, from 1862 to 1866, by Downs & Bassett, also of Birmingham. As the witnesses may have confounded the skirt in question with another which they made, and which was known as the "Eureka," and as the opposing testimony for the plaintiffs is stronger than it is in regard to the sales by the other firms, I make no finding on the subject of the manufacture by Downs & Bassett.

The bill is dismissed.

---

RUSSELL v. LAUGHLIN and others.<sup>1</sup>

(Circuit Court, D. Maine. February 18, 1886.)

1. PATENTS FOR INVENTIONS—REISSUE.

Application for a reissue having been filed within two months after the original patent was granted, *held*, that the patentees could not be charged with want of due diligence in making the application.

2. SAME—REISSUE MUST BE FOR SAME INVENTION.

If the description in the original patent does not warrant the new claims in a reissue, then the reissue is for a different invention, and no amount of diligence in the application for the reissue can make it valid.

3. SAME—REISSUE No. 10,418, OF DECEMBER 4, 1883—SHIPS' PUMPS.

The combinations embodied in the new claims in this reissue are sufficiently described in the original patent. Such claims are valid, and the tenth, twelfth, and thirteenth claims *held* infringed.

In Equity.

Wm. H. Drury and Clarence Hale, for complainant.

Charles A. Hawley and Wilbur F. Lunt, for respondents.

COLT, J. This is a suit for infringement of reissued letters patent No. 10,418, dated December 4, 1883, granted to Albert Russell and

Reported by Charles C. Linthicum, Esq., of the Chicago bar.

Francis Curtis for improvements in ships' pumps. The reissued patent contains five new claims not found in the original. The original patent was dated March 20, 1883, and the application for a reissue filed May 18, 1883. Having applied for a reissue within two months after the original patent was granted, the patentees cannot be charged with want of due diligence in making the application. *Miller v. Brass Co.*, 104 U. S. 350; *Mahn v. Harwood*, 112 U. S. 354; S. C. 5 Sup. Ct. Rep. 174. Application for a reissue having been filed within a reasonable time, and there being nothing manifest upon the record to show that the omission did not arise through inadvertence, accident, or mistake, the new claims of the reissue may be sustained, provided there is nothing in them but what is found described in the original specification and drawings. *Mahn v. Harwood*, 112 U. S. 354; S. C. 5 Sup. Ct. Rep. 174. If the description in the original patent will not warrant the new claims, then the reissue is for a different thing from the original, and no amount of diligence in the application for the reissue can make it valid. *Coon v. Wilson*, 113 U. S. 268; S. C. 5 Sup. Ct. Rep. 537. In the present case we must find sufficiently described in the original patent the combinations which are embodied in the new claims of the reissue, if they are to be sustained.

The patented pump is one of the best ships' pumps known. In a large degree it has supplanted other pumps adapted for this special use. It belongs to the class which are termed piston pumps, and its general construction resembles that of the ordinary piston pump. It is simple, compact, and strong in its construction, and efficient in its workings. It dispenses with any framework and occupies but a small space. The barrel and base are cast in one piece; also the bail and bucket. One of its main features consists in having a bore or barrel whose length is less than its diameter, which makes the pump short and convenient for use on ships. The pump has certain special but minor features, such as the V-shaped edge of the bail of the bucket, to hold the V-shaped groove in the half beam; the method of lining the barrel; the dome-shaped construction of the bucket; and the rectangular groove, with its packing in the edge face of the bucket. The nine claims of the original patent were largely for combinations to cover these special and subordinate devices. The five additional claims in the reissue relate generally to the broader elements of the machine, and especially to the feature that the barrel must have a length not greater than the diameter. These new claims are as follows:

(10) A piston or bucket pump having a base or inwardly extending flange, C, cast therewith, and having a barrel whose length is not greater than the diameter thereof, substantially as specified.

(11) A piston or bucket pump having a base or inwardly extending flange, C, cast with the barrel, a barrel whose length is not greater than the diameter thereof, and a lining rolled into the barrel, substantially as specified.

(12) In a pump, the combination of a beam or half beam pivoted to the

pump within the circumference thereof, a piston or bucket, and a barrel the length of which is not greater than the diameter, substantially as set forth.

(13) In a pump, the combination of a beam or half beam pivoted to the pump within the circumference thereof, a piston or bucket, a barrel the length of which is not greater than the diameter, and a base or inwardly extending flange, C, cast with the barrel, substantially as set forth.

(14) In a pump, the combination of a beam or half beam pivoted to the pump within the circumference thereof, a piston or bucket, a barrel provided with a lining, the length of said barrel being not greater than the diameter thereof, the barrel having a base or inwardly extending flange, C, cast therewith, substantially as described.

The elements which comprise the combinations of these claims are distinctly set forth in the specification and drawings of the original patent. The drawings in both the original and reissue are identical, and they plainly show a barrel whose diameter is greater than its length. The original specification says: "Since this lining cannot easily be worked into a pump that has its bottom or base, C, cast on, and has a barrel of ordinary length, we make the pump short, by means of the devices herein specified." Again it says: "By thus dropping the outer edge and packing of the bucket as low down as possible with reference to the remainder of the bucket, the barrel of the pump may be made very short." One of the elements of claim 9 of the original patent is "a pump body whose bore is shorter than its diameter, for the purpose of most successfully lining it, as specified." It is apparent that the original specification sufficiently describes a pump whose barrel is shorter than its diameter. There is no question that the other elements in the additional claims found in the reissue are clearly set out in the original. Under the facts presented in this case, these additional claims must be held to be valid.

The question of infringement remains. The defendants' pump is the same in its general construction, though it does not possess some of the minor features of the patented pump. It has not the V-shaped edge of the bail of the bucket, nor is the bail cast in one piece with the body of the bucket. It has not the special lining nor the dome-shaped bucket of the patented pump. It has also a different packing. There are some other minor differences. The first nine claims of the patent are for combinations all of which embrace one or more of these special but minor features of the device. In the absence, however, of any of these features from the defendants' machine, there is no infringement of these claims.

The tenth claim is for a combination of a piston or bucket pump having a base or inwardly extending flange cast therewith, and having a barrel whose length is not greater than the diameter thereof, substantially as described. This is also the construction of defendants' pump. Unable to deny this, the defendants contend that the claim is void for want of novelty and want of invention. Undoubtedly in some prior pumps we find the diameter of the barrel greater than its length, and we also find pumps with an inwardly extending

flange at the bottom of the barrel, but in no prior pump do we find the inwardly extending flange of such construction that it can be used wholly for the base of the pump, and so do away with any framework about the pump. The prior state of the art shows no piston pump which combines the two elements found in this claim. The nearest approach is seen in the old Holly pump. In the Holly pump the diameter of the barrel is greater than its length, and it has an inward extending flange. But the Holly pump rests upon a frame, and the flange does not serve as a base upon which the pump rests.

What was needed in a good ships' pump was to do away with any frame, and to make the pump small, compact, and short. This is done by making the flange at the bottom of the barrel serve as a base upon which the pump rests, and by having the diameter of the barrel greater than its length. This was first accomplished by Russell and Curtis. We find this combination in no prior device, and we think it required invention to produce it.

Claim 11 is not infringed, because the defendants' pump does not have the lining rolled into the barrel, and this is made an element of the combination; and this applies also to claim 14.

The twelfth and thirteenth claims we think are infringed. The defendants' pump has the beam or half beam pivoted to the pump within its circumference, a piston or bucket, a barrel whose length is not greater than the diameter, and a base or inwardly extending flange. The bucket in defendants' pump has not the V-shaped edge, but is connected to the half beam by a pin joint. The specification, however, describes this latter and common method of attachment, though the patentees prefer the V-shaped construction. We fail to find in any prior pumps the combinations which go to make up the twelfth and thirteenth claims of the patent.

Our conclusions are that the claims of the reissued patent are valid, and that the defendants infringe the tenth, twelfth, and thirteenth claims. Decree for complainants.

---

OHIO STEEL BARB FENCE CO. *v.* WASHBURN & MOEN MANUF'G CO.  
and another.<sup>1</sup>

(Circuit Court, N. D. Illinois. March 8, 1886.)

1. SPECIFIC PERFORMANCE.

A court of equity will not specifically enforce a contract at the instance of one of the parties who has repeatedly broken it, even if the other party has been guilty of the first breach.

2. SAME.

If one party to a contract expects to have it specifically enforced against the other, he must act steadily in good faith, by observing its terms, whether the other party violates his covenants or not.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

## 3. SAME—REMEDY AT LAW.

When a party to a contract has not kept his covenants, but excuses himself on the ground that the other party was guilty of the first breach, whatever remedy there is, is at law.

In Equity.

*Sherman & Hoyt, George C. Fry, and George S. House, for complainant.*

*Coburn & Thacher and W. C. Goudy, for defendants.*

GRESHAM, J. Prior to 1880 the defendants, as owners of certain bottom patents for barb wire fence, and machines for the manufacture of such wire, brought suits in this court against a number of alleged infringers. In December of that year the court sustained the patents, and with one exception entered the usual interlocutory decrees against the infringers. A large demand existed at this time for barb wire, and the defendants deemed it important to their interests that some arrangement should be made with the numerous infringers, nearly all of whom had been manufacturing, as they claimed, under patents, whereby further litigation might be avoided. The defendants accordingly proposed that the manufacturers should abide by the decrees which had been entered against them, assign their patents to the defendants, and accept licenses for the future. It was thought that by thus combining, a monopoly might be formed, with the defendants in control, which would be highly profitable to both the licensors and the licensees. With one or two exceptions the manufacturers agreed to this, and accepted licenses from the defendants.

By the terms of the license which the complainant accepted on the twenty-seventh day of January, 1881, it agreed to acknowledge the validity of all the patents therein embraced; that it would manufacture and sell only such barb wire as conformed to the attached sample, and make verified monthly reports to the defendants, showing the amount manufactured and sold during the preceding month, with the names and residences of purchasers, and the terms of payment and delivery; that it would make monthly payments to the defendants at the rate of three-fourths of one cent per pound on all the barb wire it should thereafter make or sell; that the defendants might annul the license if the complainant failed or refused to comply with any of its terms; that it would not manufacture exceeding 3,000 tons of barb wire annually without the written consent of the defendants; and that it would limit itself to the use of 20 machines in its factory at Cleveland, and not manufacture elsewhere. The defendants on their part agreed, as licensors, that they would not grant an exclusive license to any one under any of the patents embraced in the license; that they would not license any one else to manufacture or sell under the same patents at a lower royalty than three-fourths of one cent per pound, or, if they did, that the royalty to be paid by the complainant should be correspondingly reduced.

The sixth clause of the license reads as follows:

"Said Ohio Steel Barb Fence Company shall not sell barb fence wire, which it shall manufacture under this license, at a less price per pound, nor on more favorable terms of payment and delivery, than said Washburn & Moen Manufacturing Company and Isaac L. Elwood & Co. shall sell barb fence wire for use in the territory covered by this license, which they shall so manufacture; said Washburn & Moen Manufacturing Company to deliver to the said Ohio Steel Barb Fence Company, on the acceptance of this license by said Ohio Steel Barb Fence Company, a printed or written schedule of prices and terms of payment and delivery, the same to be fixed by said Washburn & Moen Manufacturing Company and Isaac L. Elwood, at which said Washburn & Moen Manufacturing Company and Isaac L. Elwood & Co. shall sell their own barb fence wire, to be used in the United States and territories, for the guidance of said Ohio Steel Barb Fence Company in the sale of the barb fence wire so made and sold under this license. And said Washburn & Moen Manufacturing Company shall give to said Ohio Steel Barb Fence Company 10 days' telegraphic and written or printed notice of any change in said prices, terms of payment, and delivery, to be fixed as aforesaid, and 10 days from date of such telegraphic notice such new schedule of prices, terms of payment, and delivery shall be followed and observed by said Ohio Steel Barb Fence Company, and by said licensor and I. L. Elwood & Co., until changed or modified again by said Washburn & Moen Manufacturing Company, as aforesaid, except as to previous agreements and orders already entered."

The license granted to complainant differed from the licenses which were granted to others in the combination, at or about the same time, only in the amount of wire which the complainant was at liberty to manufacture. The complainant and the defendants agreed upon the amount due from the former to the latter as damages for past infringements. This agreement was upon the basis of 60 cents per hundred pounds of barb wire previously manufactured, from which a deduction of 10 cents on each hundred pounds of past manufacture was made for the assignment by the complainant to the defendants of the patents under which the former had claimed the right to manufacture and sell. The defendants at the same time assured the complainant that all infringers should be required to settle on the same terms, and that all licensees should be required to pay the same royalty in the future. The complainant assigned its patents, settled for past damages, and accepted a license for the future upon the faith of this assurance, and an agreement that it should be observed. All the other infringers, except Jacob Haish, appear to have settled with the defendants on the same terms. For reasons given by the court, instead of being enjoined as were the other infringers, Haish was permitted to continue the manufacture and sale of barb wire upon paying into court from month to month amounts as royalty on a prescribed basis. He rejected all overtures looking to an adjustment, and refused to accept a license upon the terms accorded to the other unsuccessful infringers. He demanded immunity for the past, and a free royalty for the future. He was allowed a free royalty for the future upon the first 4,000 tons of manufacture, and required to pay 50 cents per hundred pounds on the next 4,000 tons, and 75 cents per hundred



pounds on the next 2,000 tons, 10,000 tons being the limit which he was permitted to manufacture and sell annually. If he was required to pay anything for past damages, the amount was trifling compared with what was exacted from the other licensees. This settlement, which did not occur until five or six months after the interlocutory decrees had been entered, was kept secret from the complainant and the other licensees. The license which Haish accepted differed from the licenses granted to others only in the amount of tonnage, but, by another instrument executed at the same time, he was entitled to a rebate which made his royalty for the future as above stated.

Unable to induce Haish to enter the combination upon equal terms with the other manufacturers, the defendants, in order to procure his patents and get him out of the way, and maintain the monopoly, admitted him on secret terms which amounted to a fraud upon the complainant and other licensees. Fearing that his longer standing out would deprive the defendants of the large revenue which they expected to derive from the monopoly; they felt constrained to concede to him terms more favorable than others enjoyed, and thus induce him to accept a license which they would not have accorded him had he been enjoined as were the other infringers. His patents and the patents which the other infringers had relied upon in the litigation had shared the same fate, and it is a mere pretense for the defendants to say that his patents were more valuable than the others, and for that reason were bought for the benefit of the other licensees, as well as for their own benefit. The defendants expressly agreed with the complainant, as they no doubt did with the other licensees, that Haish should not be permitted to enter the combination on terms which would give him an advantage over them as a manufacturer and dealer.

The evidence shows that, during much of the time after the complainant and other manufacturers became licensees, the market price of barb wire ruled lower than the schedule rates; and while it is uncertain, from the evidence, whether the complainant or the defendants first disregarded the schedule rate, there is no doubt they both violated the agreement by underselling, hoping thereby to get an unfair advantage. Authority was given the defendants to revoke the licenses of such manufacturers as sold below the schedule rate. It was the duty of the defendants to exercise this authority for the protection of licensees who kept faith with the combination, if indeed any of them kept faith. It may be that unlicensed manufacturers rendered it difficult, if not impossible to maintain the schedule rate; but however that may have been, the complainant is in no condition to insist that the monopoly shall be longer maintained. It is now in a court of equity, asking that a contract be specifically enforced which it has repeatedly broken. The complainant insists that it may do this because the defendants were guilty of the first breach. This may or may not be true, but, if true, still the complainant acted in bad faith. The evidence does not show that all the members of the combination

ignored the schedule rate, although it tends to show that fact. Such a showing would amount to an abandonment, and leave the parties as they stood before the combination was organized. The complainant not only broke its agreement, but it resorted to subterfuges to conceal sales which it made at market or other lower rates than schedule rates. This plainly indicated a purpose on the part of the complainant to take an unfair advantage of its associates in the combination, including the defendants. If the complainant expected to insist upon a specific enforcement of its agreement with the defendants, it should have steadily acted in good faith itself by observing the terms of the agreement; and this it should have done whether the defendants had violated their covenant or not.

It follows that if the complainant is entitled to any relief against the defendants it is in a court of law, and the bill is therefore dismissed.

---

### TUBULAR RIVET CO. v. COPELAND.<sup>1</sup>

(*Circuit Court, D. Massachusetts.* February 20, 1886.)

#### 1. PATENTS FOR INVENTIONS—REISSUE.

The seventh claim of reissued letters patent No. 8,276, granted June 11, 1878, to Mellen Bray, for an improvement in rivet-setting machines, is broader than the original patent, and the reissue having been applied for over three years from the date of the original, such claim is void.

#### 2. SAME—INFRINGEMENT.

The eighth claim of this reissue, for "The receiver, N, provided with the springs, r, and r', mounted upon the setting plunger, B, and adapted to operate substantially as described," is not infringed by a receiver consisting of a long lever, pivoted, at its rear end, to the supporting frame of the machine, and composed of two elastic strips of metal, flaring at their front ends to hold the rivet.

*In Equity.*

*Chauncey Smith*, for complainant.

*G. M. Plympton*, for defendant.

COLT, J. This suit is brought for the infringement of reissued patent No. 8,276, granted to Mellen Bray, June 11, 1878, for an improvement in rivet-setting machines. The original patent was granted April 6, 1875. The application for the reissue was made May 27, 1878,—more than three years after the issue of the original patent. The seventh and eighth claims of the reissue form the subject-matter of the present controversy. They are as follows:

"(7) In combination with a reciprocating plunger and a clinching anvil, a receiver provided with spring or yielding sides, and adapted to receive the rivet, and hold it in a perpendicular position between the plunger and anvil,

<sup>1</sup>Reported by Charles C. Linthicum, Esq., of the Chicago bar.

and to be moved vertically, or in line with the movement of the plunger, during the first part of the downward movement of said plunger, and guide the rivet to the work, and then remain in a state of rest till the plunger has completed its downward motion, and forced the rivet from the receiver into the material, substantially as described. (8) The receiver, N, provided with the springs, r, and r', mounted upon the setting plunger, B, and adapted to operate substantially as described."

The seventh claim is not found in the original patent. The eighth claim of the reissue was the seventh claim of the original. In the original patent the receiver is subject to the limitation of being "mounted upon a movable setting plunger, and made to move at times with said setting plunger." In the reissue these words are omitted, and it is no longer necessary to mount the receiver upon the plunger, but to locate the receiver between the anvil and the movable setting plunger. In the original patent the receiver is attached to the plunger. In the reissue, by the seventh claim, it is only necessary to locate the receiver between the plunger and anvil. The claims of the reissue are clearly broader than the original, and therefore the seventh claim of the reissue, under the recent decisions of the supreme court, must be held to be void. *Miller v. Brass Co.*, 104 U. S. 350; *James v. Campbell*, Id. 356; *Mathews v. Machine Co.*, 105 U. S. 54; *Bantz v. Frantz*, Id. 160; *Johnson v. Railroad Co.*, Id. 539; *Gage v. Herring*, 107 U. S. 640; S. C. 2 Sup. Ct. Rep. 819; *Clements v. Odorless E. A. Co.*, 109 U. S. 641; S. C. 3 Sup. Ct. Rep. 525; *McMurray v. Mallory*, 111 U. S. 97; S. C. 4 Sup. Ct. Rep. 375; *Turner & Seymour Manuf'g Co. v. Dover Stamping Co.*, 111 U. S. 319; S. C. 4 Sup. Ct. Rep. 401.

The question remains whether the defendant infringes the eighth claim of the reissue, which is like the seventh claim of the original. We do not find the combination described in this claim, in defendant's machine. The receivers differ materially in construction. The defendant's receiver is not attached to the setting plunger. It does not consist of a tubular thimble fitted loosely to the plunger, and held in position by a pin set in the plunger, and projecting outward into a slot formed in the thimble. Nor has it the side springs described in the Bray patent. On the contrary, the defendant's receiver consists of a long lever, pivoted, at its rear end, to the supporting frame of the machine, and composed of two elastic strips of metal, flaring at their front ends to hold the rivet. It is thrown upwards by a spring fixed to the arm of the machine. We would not be warranted in putting such a broad construction on the eighth claim of the Bray reissue as to make it include the defendant's machine, when it differs so materially in construction. We therefore find no infringement of the Bray patent, and the bill must be dismissed. Bill dismissed.

## THE DIRECTOR.

(*District Court, D. Oregon. March 5, 1886.*)

1. JOINDER OF CAUSES OF ACTION IN REM AND PERSONAM.

The admiralty rules from 12 to 20, inclusive, relating to joinder of causes of action, do not apply to cases not therein enumerated; but the same, under rule 46, may be proceeded with, in this respect, in such manner as the court may deem expedient for the administration of justice.

2. SUIT ON A CHARTER-PARTY.

In a suit by a shipper for the non-performance of a contract of affreightment, the facts which establish the liability of the master also give the libellant a lien on the vessel for the amount of his claim, and therefore it is proper and expedient that the proceeding against the owner or the master and the vessel should be joined in one libel.

3. REPLEVIN IN ADMIRALTY.

When the possession of personal property has been changed by means involving the breach of a maritime contract concerning the same, or such possession is wrongfully withheld contrary thereto, the owner or other person entitled, under the circumstances, to the possession thereof, may maintain a suit in admiralty to obtain the same.

4. DAMAGES—GENERAL AND SPECIAL.

Damages that are not the necessary result of the act complained of, and therefore not implied by law, are special, and the facts constituting them must be particularly stated in the libel.

Suit on Charter-party.

*C. E. S. Wood and John W. Whalley, for libelants.*

*Thomas N. Strong, for master and claimants.*

DEADY, J. This suit was brought by the libelants, Alexander Balfour, Stephen Williamson, Robert Balfour, Alexander Guthrie, and Robert B. Foreman, doing business in this port as Balfour, Guthrie & Co., on November 22, 1885, to recover the possession of 16,868 bags of wheat, weighing 985,484—2,240 gross tons; and \$4,600 damages for the non-fulfilment of a contract of affreightment thereabout. On reading and filing the libel, an order was made thereon, allowing process to issue as prayed for therein, on which the vessel and wheat were subsequently arrested. On January 4th, the master, William D. Bogart, filed a claim of ownership for William W. Trombull. The case was argued and submitted on exceptions to the libel.

From the latter it appears that on October 3, 1885, William D. Bogart, master of the British bark *Director*, then lying at this port, made a charter-party with W. J. Burns, the local agent of the libelants, whereby he contracted to carry on said vessel, at 42s. 6d. a ton, a cargo of wheat to a port in the United Kingdom; that between said date and October 8th said vessel was laden by the libelants with the wheat aforesaid, consigned to their own order, for which the master signed two bills of lading, one of which was delivered to the libelants, and on November 14th remailed by them to said agent for re-

turn to said master; that in and by said charter-party it was expressly agreed that said vessel was "tight, staunch, strong, and in every way fitted for such voyage," when in fact she was so unseaworthy that as soon as the cargo was on board she commenced to leak so badly she could not proceed on her voyage, and her cargo was discharged; that said vessel had been in a leaky and unseaworthy condition on her voyage from Hong Kong to this port, and prior thereto, during which she made water at the rate of three inches an hour, until relieved of her cargo in the Columbia river and at Portland, when the leak became immaterial; that said leak was caused by an inherent defect and unseaworthiness of said vessel,—all of which was well known to said master at the date of said charter-party and long prior thereto, and was then fraudulently concealed from the libelants by said master, and afterwards, while the vessel was loading, by preventing the working of her pumps otherwise than secretly between 9 p. m. and midnight; that by reason of said false warranty the "libelants have lost a sale" of said wheat, negotiated and contracted in London on October 5, 1885, "whereby they are damaged in the sum of \$4,000, and also by the loss of \$100, the premium paid on marine insurance on said wheat while on board, and \$500 of expenditures contingent on the transaction.

The prayer of the libel is for due process against the vessel and the wheat, to the end that the former may be condemned and sold to pay said damages, with interest and costs of suit, and the latter delivered to the libelants free of charges or liens; and that the master be cited to appear and answer the libel, and the charter be annulled and declared void from the beginning.

The exceptions to the libel are to the effect: (1) It "misjoins" a suit *in rem* against the vessel with a suit *in personam* against the master; (2) it "misjoins" a cause of suit for a breach of the warranty in the charter, and to avoid the same on account of the fraud of the master; (3) it does not show that the libelants are the owners of the wheat, or what, if any, interest or claim they have therein or thereto; and (4) the allegation in article 11 concerning the sale of the wheat is uncertain and insufficient.

As preliminary to the consideration of the questions made by these exceptions, it may be premised that, in the absence of the owner or of his special representative, the master of the Director was authorized to make this charter-party, and to thereby contract, as he did, for the carriage of this wheat, and the fitness of the vessel for the service. The transaction was within the scope of his ordinary power, as master, while engaged in the navigation of the vessel in a foreign port, and the vessel and owner are each liable for his fraud or misconduct in making said contract, or the failure to perform the same. *The Zenobia*, Abb. Adm. 48; *U. S. v. The Malek Adhel*, 2 How. 234; *Hurry v. Hurry*, 2 Wash. C. C. 149; *Ward v. Green*, 6 Cow. 175; *The Tribune*, 3 Sum. 149; 1 Pars. Shipp. & Adm. 276, note 3; 2 Pars.

Shipp. & Adm. 8, 10, 12. But it must be understood that the vessel is not liable for a breach of a contract of affreightment so long as it is wholly executory, though the master and owner are. *The Ira Chaffee*, 2 Fed. Rep. 401. But as soon as the performance of the contract is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit *in rem* may be maintained against the same for any liability of the master or owner arising on or growing out of such contract. *The Hermitage*, 4 Blatchf. 475; *The Monte A.*, 12 Fed. Rep. 332; *The Keokuk*, 9 Wall. 519; *The Zenobia*, Abb. Adm. 80; *The Windermere*, 2 Fed. Rep. 722.

In this case the performance of the contract had commenced by the lading of the cargo, and the master, owner, and vessel are each liable thereon. Such being the case, can the libellant pursue his remedy against the vessel and the master, the one being *in rem* and the other *in personam*, in one suit? The point has been contested in the American courts, and yet, but for a *dictum* of Mr. Justice STORY in the case of *Citizens' Bank v. Nantucket S. B. Co.*, 2 Story, 57, I do not think there would be any question about it. That suit, which was brought against the company as a common carrier, was decided in its favor, on the ground that the carriage of bank-bills was not within the scope of its ordinary employment, and therefore it was not liable on the master's undertaking in respect to the same; to which Mr. Justice STORY added:

"In the course of the argument it was intimated that in libels of this sort the proceedings might be properly instituted both *in rem* against the steam-boat, and *in personam* against the owners and master thereof. I ventured at that time to say that I knew of no principle or authority, in the general jurisprudence of the courts of admiralty, which would justify such a joinder of proceedings, so very different in their nature and character and decretal effect."

It is said that Homer sometimes nods; and, taking this instance as an illustration, I think the same may be said of the learned and enlightened jurist who did so much in his day to establish and maintain the admiralty jurisdiction of the American courts, unhampered by the arbitrary restrictions once imposed thereon, in England, by the jealousy of the common-law courts and lawyers, and to formulate for them a comprehensive and convenient rule of procedure.

In a suit for a breach of a charter-party or contract of affreightment, whether brought against the master, owner, or vessel, there is no substantial difference, either in allegation, proof, or decree. The liability in either case grows out of the same facts, and the relief sought and obtainable is the same. The only difference is in the enforcement of the decree, and that is merely a difference in degree; the enforcement of the one given in the suit *in rem* being, in the nature of things, limited to the sale of the vessel proceeded against, while the one in the suit *in personam* may be enforced by an execution against the property of the defendant generally. This being so, every

argument founded on convenience and economy is in favor of their joinder in one suit.

In the consideration of this question in *The Clatsop Chief*, 7 Sawy. 274, S. C. 8 Fed. Rep. 163, I said:

"My own impression of the matter is with Mr. Benedict, when he says (Ben. Adm. § 397) 'that whenever the libelant's cause of action gives him a lien or privilege against the thing, and a full personal right against the owner, then he may, by a libel properly framed, proceed against the person and the thing, and compel the owner to come in and to submit to the decree of the court against him personally in the same suit, for any possible deficiency.' It is a question simply of procedure, and should be determined mainly, if not altogether, upon considerations of fitness and convenience; and every argument drawn from this source is in favor of the joinder of the remedies *in rem* and *in personam*, whoever the person may be, and pursuing them in one libel, as one suit."

By the admiralty rules, from 12 to 20, inclusive, adopted by the supreme court in 1845, and since the decision of the case of *Citizens' Bank v. Nantucket S. B. Co.*, *supra*, this subject is regulated in some of its phases, but not in the case of a suit for a breach of a charter-party or contract of affreightment. By these, in the case of a suit for wages, pilotage, or damage by collision, the libelant may proceed against the ship and master. The mode of proceeding allowed by these rules is considered to be exclusive of any other in the cases to which they apply. *The Richard Doane*, 2 Ben. 112. But, under admiralty rule 46, this court may proceed, in all other cases in this respect, according to such rule as may be deemed most expedient for the due administration of justice. Under this authority the district courts have generally assumed that it is not only expedient, but according to the general rule of admiralty procedure, in a cause upon a contract of affreightment, to proceed against the master and the vessel in one suit; and, as I have already said, in my judgment, there is no doubt of the propriety and legality of so doing. *The Monte A.*, 12 Fed. Rep. 336; *The Zenobia*, Abb. Adm. 52; *Vaughan v. Six Hundred and Thirty Casks of Sherry Wine*, 7 Ben. 507.

In the latter case the suit was brought on a bill of lading against the goods, and the consignee thereof, to recover the freight thereon. The libel was excepted to on account of the joinder of the causes of action against the *res* and the person. Mr. Justice BLATCHFORD, in disposing of the exception, says: "This exception is overruled. The cause of action arises out of a contract which, if the respondents are liable on it, also binds the property. There is no good reason for not joining the causes of action."

The second exception is not well taken. If a court of admiralty has jurisdiction of a suit to declare this charter-party void for the fraud of the master, leading to and inducing its execution by the libelants or charterer, the joinder, in such suit, of a claim for damages on account of such fraud, does not appear to be improper; but if it has not such jurisdiction, then the prayer for relief against such charter-

party, by having it declared void *ab initio*, should have been excepted to alone, and on that ground.

The third exception is also disallowed. The right to maintain a suit in admiralty for the possession of this wheat is not challenged by this exception; but the point made thereby is that it does not appear that the libelants have such an interest in the property as entitles them to maintain such suit at all. When the possession of personal property has been changed by means involving a breach of a maritime contract concerning the same, or such possession is wrongfully withheld contrary thereto, the owner or other person entitled, under the circumstances, to the possession thereof may maintain a suit in admiralty to obtain the same. *In re 528 Pieces of Mahogany*, 2 Low. 323, and cases there cited; 1 Kent, Comm. 379.

Upon the facts stated, the libelants, as against the vessel and the master, are entitled to the possession of the wheat, and may maintain an action to recover the possession of the same. True, it is not alleged in so many words that the libelants are the owners of the wheat, though such is the fair inference from the facts stated. Nor is such an allegation necessary. It does appear that the libelants had the possession and control of the wheat, and placed it on board the *Director* for carriage to Europe, on their own account, under the stipulations of the charter-party, and that the master, in violation thereof, has discharged the same on the dock in this port. Except under special circumstances, a carrier is not allowed to dispute the title of the person who delivers goods to him for transportation. *Rosenfield v. Express Co.*, 1 Woods, 131. In Ben. Adm. 476, a precedent is given of a libel *in rem* against certain merchandise, by the consignee thereof, for the possession of the same, that was withheld by the master of the vessel on which it was brought from Liverpool to New York, on a disputed claim for average contribution. It is not alleged that any one owned the merchandise in question, but only that it was shipped by John Brown, of Liverpool, and consigned to the libelant. The master of the *Director* is not at liberty to question the libelants' right to the possession of this grain contrary to or outside of the stipulations of the charter-party. *Prima facie*, they are the owners of it, and entitled to maintain an action to regain the possession thereof, which they appear to have parted with on the faith of the master's representation that his vessel was "tight, stanch, and strong, and in every way fitted" for the voyage she was about to undertake, when in fact she was not, and he knew it.

This proceeding is, in substance, the same as the common-law action of replevin. A special property in the goods in question is sufficient to enable the plaintiff to maintain that action against any one but the general owner. Chit. Pl. 187; *Dillenback v. Jerome*, 7 Cow. 300, note; *Smith v. James*, Id. 328; *Portland Bank v. Stubbs*, 6 Mass. 426. In the latter case the court held that the consignee of a cargo of salt shipped at Liverpool for Boston might maintain replevin



against the master for the same at Portland, Maine, on the refusal of the latter to proceed to Boston with the salt, or deliver it to the consignee at Portland.

The fourth exception is taken to so much of the eleventh article of the libel as alleges that, by reason of the premises, the "libelants have lost a sale of the aforesaid cargo, negotiated and contracted in London, October 5, 1885," to their damage \$4,000. This is not a statement of general damages suffered by the libelants on account of the failure to carry the wheat according to contract, but an attempt to state a case of special damages arising therefrom; and, considered in this light, I think it is clearly insufficient. For instance, the loss of this sale did not necessarily damage the libelants. That depends on circumstances concerning which the libel is silent, such as the subsequent rise or fall of the market; and if they were injured at all by the loss of the sale, there are no facts stated showing, or tending to show, how they were injured or the amount of the damages. In order to prevent surprise to the adverse party, special damages, or such as are not the necessary consequence of the act complained of, and are not therefore implied by law, must be particularly stated. 1 Chit. Pl. 440-444; *Squier v. Gould*, 14 Wend. 160; *Stevenson v. Smith*, 28 Cal. 103.

This exception is allowed.

---

### *In re GOODRICH TRANSP. Co.*

(*District Court, E. D. Wisconsin. March, 1886.*)

#### 1. ADMIRALTY JURISDICTION—LIMITATION OF LIABILITY ACT—WHAT DAMAGES EMBRACED BY ACT—LOSS CONSUMMATED ON LAND OR WATER.

The statutory rule of limited liability embraces all damages done by the vessel without the privity or knowledge of the owner, whether consummated on water or land.

#### 2. SAME—RULE A MARITIME REGULATION.

The rule, thus construed, is a maritime rule or regulation, and courts of admiralty and maritime jurisdiction have authority to enforce it.

#### 3. SAME—EXTENT OF JURISDICTION.

Admiralty courts, having jurisdiction to enforce the rule, and of the fund representing the value of the vessel, have jurisdiction of the enforcement of claims on that fund as auxiliary and incidental to their jurisdiction of the main subject.

#### Petition to Limit Liability, etc.

This was a petition stating, in substance, that on the twentieth day of September, 1880, the petitioner was the owner of the steam-boat Oconto, a steam-vessel engaged in interstate commerce on the Great Lakes; that on that day, shortly after the Oconto had passed up Fox river by the city of Green Bay, in the course of a regular voyage, a fire broke out on shore in that city, which, spreading, consumed in

its course 67 buildings and a large amount of personal property, of the aggregate value of more than \$100,000; that afterwards, six actions were commenced against the petitioner by persons whose property was destroyed by the conflagration, claiming damages to an amount exceeding \$30,000, which actions are pending in the state courts of Wisconsin; that in such actions it is claimed that the fire originated from the steamer while passing up the river; that a large number of other persons, suffering loss of property in the same fire, make claims against the petitioner, and intend to bring similar actions; that if the fire was caused by the steamer it was without the privity or knowledge of the petitioner; and that the value of the vessel and her pending freight, at the time of the fire, was \$12,400. The petitioner denied liability, and prayed for the relief provided by the act of congress known as the "Limited Liability Act," (secs. 4281-4289, Rev. St.,) and the supplementary rules of practice in admiralty, No. 54 *et seq.*, promulgated by the supreme court, May 6, 1872, at beginning of 13 Wall. Rep.

Notices having been duly served and published, in conformity to the rules, the respondents appeared, answered the petition, and moved to dismiss the proceedings, which motion was orally argued at the bar.

It was argued by Mr. Rae in support of the motion—*First*, that the act does not embrace injuries to property on shore, but only injuries occurring, through the default of the master or mariners, without the privity or knowledge of the owner of the offending vessel, to property which is the subject of commerce in transit on the high seas and the navigable waters of the United States; *second*, that if the act does embrace injuries to property on shore, the district courts of the United States have not jurisdiction, either under the statute or the rules in admiralty, to give the petitioner the relief it seeks,—the tort complained of not being a marine tort, and therefore not within admiralty cognizance; *third*, that the fact that the act may be supported under the commercial grant in the constitution, as a regulation of commerce, cannot confer jurisdiction upon an admiralty court of the United States; *fourth*, that if congress could not enlarge the jurisdiction of the United States district courts sitting in admiralty, then the act of 1842, which conferred upon the supreme court of the United States authority to prescribe modes and forms of procedure in equity and admiralty cases only, could not authorize that court, by rules of practice, to enlarge the admiralty jurisdiction; *fifth*, that the admiralty rules themselves are confined to and contemplate a case of admiralty jurisdiction purely.

It was argued by Mr. Greene, *contra*—*First*, that damage done by a vessel to property on shore, without the privity or knowledge of the owner, falls within the third specification of section 4283, viz.: "For any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner;" that the purpose of the rule of limited liability, being to promote and

encourage shipping, the power to prescribe that limitation is found in the commercial clause of the constitution. The power to make the regulation depends upon the thing regulated,—commerce,—not upon the judicial classification of the thing protected against. The common law is no more sacred against change and modification by a regulation of commerce by congress than maritime or statutory law. Each must yield, so far as they may be in conflict with such a regulation. The commercial clause applies to commerce on land as well as on water. *Second.* That the district court has jurisdiction of this proceeding in admiralty, although the tort complained of is not maritime. The case presented by the petition being within the statutory limitation of liability, if that limitation is a maritime rule or regulation, whether the damage is done on land or on water, the enforcement of that rule by this proceeding must be a maritime case. As the statute is a regulation of a maritime subject,—ships and shipping, or commerce by water,—it is a maritime regulation, and congress may rightfully vest in the federal courts jurisdiction for its enforcement under the constitutional provision that the judicial power of the United States shall extend to all cases of admiralty or maritime jurisdiction. The rule is equally maritime, whether it protects against liability for damage done by the ship on water or on land. It is the thing protected that characterizes the rule, not the thing against which protection is given; and the thing protected, being shipping and commerce by water, the rule is maritime.

Among the cases referred to on argument were *Norwich Co. v. Wright*, 13 Wall. 104; *The Plymouth*, 3 Wall. 20; *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578; S. C. 3 Sup. Ct. Rep. 379, 617; *The Benefactor*, 103 U. S. 239; *The Scotland*, 105 U. S. 24; *The Lottawanna*, 21 Wall. 588; *The City of Columbus*, 22 Fed. Rep. 460; *The Amsterdam*, 23 Fed. Rep. 112; and *In re Vessel Owners' Towing Co.*, 26 Fed. Rep. 169-172.

*Jenkins, Winkler, Fish & Smith*, (Geo. G. Greene, of counsel,) for petitioner.

*Robert Rae and Charles E. Vroman*, for respondents.

DYER, J., held (1) that the statutory rule of limited liability embraces all damages done by the vessel without the privity or knowledge of the owner, whether consummated on water or on land; (2) that the rule thus construed is a maritime rule or regulation; (3) that, being a maritime rule or regulation, courts of admiralty and maritime jurisdiction have authority to enforce it; (4) such courts, having jurisdiction to enforce the rule, and of the fund representing the value of the vessel, have jurisdiction of the enforcement of claims on that fund as auxiliary and incidental to their jurisdiction of the main subject.

WALL, Jr., Master, etc., v. NINETY-FIVE THOUSAND FEET OF LUMBER.<sup>1</sup>

(District Court, S. D. New York. February 1, 1886.)

## 1. CHARTER-PARTY—FREIGHT—PRIOR-ORAL AGREEMENT—EVIDENCE—MANAGING OWNERS—POWER OF ATTORNEY.

The master of a vessel at Pensacola offered H. Bros., acting for W. & Co., of New York, a charter of his vessel, to take lumber to New York at nine dollars a thousand feet. The managing owners, at Boston, wishing to get the vessel, which had been long in southern ports, into their possession, requested W. & Co. to take the charter, and agreed that only eight dollars a thousand should be charged against them under it. The charter was thereupon effected. On the arrival of the vessel, W. & Co. refused to pay more than eight dollars, and the master libeled the lumber to recover the charter price of nine dollars. It appeared that the managing owners not only represented a majority in interest of the owners, but held a power of attorney, signed by various owners and by the master, who owned one-eighth, which authorized the managing owners, among other things, to obtain possession of the vessel, and to settle freight-bills. *Held*, that the power of attorney gave the managing owners authority to settle bills for freight, and, as incident to that, to agree on a remission of one dollar per thousand; that this authority prevailed over the master's authority, and that the oral agreement prevailed for a remission of one dollar per thousand, upon the price named in the subsequent written charter, which was signed in part execution of the prior oral agreement; and, that agreement being fully proved, there could be no recovery over eight dollars per thousand.

## 2. DEMURRAGE—VESSEL AGROUND—THREE DAYS ALLOWED.

Claim was also made to recover for 11 days' demurrage. *Held*, that charterers were not liable for delay while the vessel was aground without their fault, nor for delay in getting a berth caused thereby; and that, after deducting for such delays, but three days were left for which libellant was entitled to demurrage.

In Admiralty.

*Goodrich, Deady & Platt*, for libellant.

*William Hildreth Field*, for claimants.

BROWN, J. The controversy in this case has arisen out of the difference between the master of the schooner Sarah Potter, and her agents or managing owners. In the spring of 1880, Cousens & Pratt, of Boston, owning and representing the majority in interest of the schooner, which for some years had been run by the master in southern ports, were anxious to bring her to this vicinity. On the seventeenth of March they executed a charter-party to Mosely, Wheelwright & Co. for the transportation to Boston of a cargo of lumber from Pensacola, where the schooner then was, at \$8.50 per thousand. The master, on the presenting of the charter, refused to recognize it, or to load the schooner. Subsequently, on the third of May, 1880, the master, at Pensacola, executed a charter to Hyer Bros., of that place, for a cargo of lumber to New York, at the rate of nine dollars per thousand. She was thereupon loaded, and brought to New York. Hyer Bros. were in reality acting for the firm of W. D. Wheelwright & Co., of New York, the same firm as Mosely, Wheelwright

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

& Co., of Boston; and the cargo brought was the same cargo referred to in the previous charter. Cousens & Pratt had in the mean time requested Wheelwright & Co., of New York, to take the charter offered to Hyer Bros. by the captain, at the rate of nine dollars, and had agreed with the charterers that only eight dollars per thousand should be charged against them under it. Upon the arrival in New York, the charterers refused to pay but eight dollars a thousand, and this libel was filed by the master to recover the charter price of nine dollars a thousand, with 11 days' demurrage.

The evidence shows, not only that Cousens & Pratt represented the majority in interest, but, upon testimony that I think should be held satisfactory, that they held a power of attorney signed by the master, who was a one-eighth owner, and by various other owners, amounting altogether to forty-two sixty-fourths, giving them authority, as ship's husbands and managing owners, to attend generally to all the business of the ship, including the chartering of her, as well as the collection and settlement of bills for freight. As the power of attorney was lost, having been destroyed by water, there is possibly some uncertainty as to its precise terms; and it may be that the express authority to charter the schooner was not inserted; but, in the view that I take of the case, that is not material. Under the other powers contained in that instrument, they were authorized to obtain possession of the vessel; to take such steps as might be necessary for the purpose of settling her freight-bills; and to make such agreements in that behalf as, in their judgment, were necessary. Upon the evidence it is clear that the arrangement with Wheelwright & Co., to accept the charter of the third of May, was made for the purpose of bringing the vessel within their reach, and on an agreement to charge but eight dollars a thousand for the lumber, notwithstanding that the charter price was nine dollars. They have so testified upon this trial. The power of attorney clearly gave them authority to settle bills for freight, and, as incident to this power, to agree upon a remission of one dollar per thousand, if they would accept the charter. This authority bound the master, as well as the other owners who executed the power of attorney. If the remission of one dollar in the freight was an abuse of their power, those interested in the vessel must look to the agents to answer for it. The agreement is valid between the agents, who were the managing owners, and Wheelwright & Co., the claimants. It was an agreement outside of the charter-party and independent of it. It embraced the subject of the execution of the charter-party, as a part of the prior oral agreement, upon the condition of a remission of a dollar per thousand. That agreement is fully proved. There is no dispute of the fact.\* It was made by the ship's husbands and agents, who, as against the captain, had the prevailing authority; and that agreement is therefore the prevailing agreement. No recovery can be had, therefore, in this action beyond eight dollars per thousand.

2. As respects demurrage, it appears that the vessel was in charge of a marshal from the time she arrived until after her discharge was completed. I find that, deducting Sundays, and the time lost when the vessel was aground without any fault of the claimants, and the loss of a berth occasioned from this cause, and her subsequent not moving when directed, there were but three days left for which demurrage should be charged. This, at \$36 per day, amounts to \$108, which will be allowed, with interest from July 20, 1880.

The rate of eight dollars per thousand having been paid shortly after the libel was filed, a decree will be entered for the amount of demurrage, with interest and costs.

---

### THE MODOC.

EVANS, Owner, etc., v. NORTH-SIDE BRIDGE CO.

(District Court, W. D. Pennsylvania. February 6, 1886.)

1. NAVIGABLE RIVER—CONSTRUCTING BRIDGE—PILES.

A company authorized to construct a bridge over the Allegheny river, in the course of the work, may lawfully drive piles in the bed of the river at a pier-site; but if, at an ordinary flood-stage, such piles are likely to become a hidden and dangerous obstruction to navigation, it is the duty of the company to mark the place distinctly by a buoy, or otherwise, even although the submerged caisson and piles might create a break on the surface of the water which a skillful navigator would observe in daylight and understand.

2. SAME—BACKING STEAM-BOAT AGAINST PILES.

A steam-boat, the pilot of which knew that the submerged piles were there, is chargeable with negligence in backing towards the place of danger in daylight, without having a lookout at the stern of the boat to give warning to the pilot.

3. SAME—VESSEL SUNK—NEGLIGENCE.

The steam-boat having struck the submerged and unmarked piles, and sunk, *held*, that both parties were in fault, and the damages should be equally divided.

In Admiralty.

*Knox Reed*, for libellant.

*W. B. Rodgers*, for respondent.

ACHESON, J. The defendant company, having lawful authority to erect its bridge over the Allegheny river, undoubtedly had the right to drive piles in the bed of the river, as was done here; but, in the exercise of that right, the company was bound to observe all reasonable precautions to secure the safety of boats navigating the stream; and if, at an ordinary flood-stage of the river, such piles were likely to become a hidden and dangerous obstruction to navigation, it was the duty of the company to mark the spot by a buoy, or otherwise, so as to put approaching boats on their guard; and, although the sub-

murged caisson and piles might create a break on the surface of the water, which a skillful navigator would, in daylight, observe and understand, still the full measure of duty to the public would be met only by distinctly marking such place of danger.

The testimony is very contradictory, as to whether or not the piles in question were concealed underneath the water at the time of the sinking of the Modoc. I see no reason to doubt the integrity of any of the witnesses; but, on the one side or the other, mistake there must be. Possibly, the elevated situation of some of the respondent's witnesses enabled them to see the heads of piles, which in fact were beneath the water, and not visible to persons in other positions. But, even if the respondent's witnesses are correct, only two or three of the piles, at the most, were in sight, and these projected above the water less than a foot. I think, however, the clear weight of evidence upon this point is against the respondent. That all the piles were under water, the two Merringtons, O'Neill, and the engineer, Evans,—each of whom made a particular examination the evening of the accident, or the next morning,—positively testify. This testimony, which comes from the libellant's side, is strongly confirmed by a fact mentioned by James Wells, one of the respondent's principal witnesses. He testifies that at 5 o'clock p. m. of the day next after the casualty, the highest pile stood only six or eight inches out of water. Now, this was 24 hours after the sinking of the Modoc, and the river had been falling in the mean time. Upon the whole proofs, my conclusion is that all the piles were covered by water when the Modoc was injured.

The stage of water was about 11 feet. This was not an unusual stage. The site of the pier in question was in the harbor of Pittsburgh, near one of the public wharves, and at a place where boats were accustomed to ply. I am, then, of opinion that on the part of the respondent there was negligence contributing to the catastrophe which befell the Modoc, in that the sight of the submerged work was not marked.

But was the Modoc herself free from fault? The work at this pier was begun about the middle of December, 1883. In the interval between that date and the time of the accident, February 23, 1884, the Modoc was much about that part of the river, and once took a flat from the very place where this work was in progress. Indeed, it is definitely proved that her pilot knew the piles were there. On the occasion of the disaster the Modoc had rounded in below the site of the bridge to take out an empty flat which lay at the Pittsburgh shore. After hitching to the flat, she proceeded to back up stream towards the piles. Now, under the circumstances,—backing towards a known obstruction under the surface of the water,—good boatmanship assuredly required that a lookout be kept at the stern of the Modoc. It was broad daylight, and there was such a break in the surface of the water, over the site of the pier, that any person on watch at the stern of the boat could have seen the danger, and, by

warning the pilot, averted the mishap; but no such measure of safety was observed. Without further discussion of the evidence, I content myself with saying that it clearly convicts those employed on the Modoc of negligence which contributed to the disaster. Admissions to this effect, of the libelant himself, are among the proofs.

The case, then, being one where both parties were in fault, justly falls within the rule enforced in *Atlee v. Packet Co.*, 21 Wall. 389, and the damages should be equally divided between them.

This brings us to a consideration of the amount of damages. The libelant's bill is for \$1,782.15, but there are admitted deductions to be made, amounting to \$49. Then the item of \$6.40, for "steerage blocks and steel bolts," is to be stricken off for lack of proof. It would have been more satisfactory had there been distinct proof of the time occupied in repairing the boat. But here I will accept the claim as made. It seems right enough to pay the wages of the crew for the lost time, but I see nothing in the evidence to warrant such allowance to the libelant, who was not under pay. Hence the \$80 claimed by him must be disallowed. The bill embraces a *per diem* claim "for lost time of boat," and the charge is \$10 a day for 25 days, and \$15 a day for 7 days. This difference in rate, it would seem, is entirely arbitrary. Aside, however, from this consideration, there is an utter want of evidence to sustain the claim. If allowable, it must be on the ground of a loss of net earnings, for the wages of the crew are provided for. But there is no proof that the Modoc lost employment; nor, indeed, is anything shown by which to measure her net earnings had she been employed. Upon a claim of this nature the general assertion of the libelant, in the course of his examination in his own behalf, that his bill is correct, does not rise to the required standard of proof. This claim, therefore, must be rejected. Correcting the libelant's bill as above indicated, leaves the damages at \$1,291.75.

Let a decree be drawn in favor of the libelant for one-half the above damages and half costs.



## KING v. NEILL, Sheriff, etc., and others.

(Circuit Court, S. D. Georgia, E. D. November, 1885.)

## REMOVAL OF CAUSE—BANKRUPTCY—DISCHARGE—EXEMPT PROPERTY.

On a suit between citizens of the same state, removed from the state court, the circuit court has no jurisdiction, after a discharge in bankruptcy, to protect property exempted by the bankrupt court from judgment liens existing prior to the application for bankruptcy, and such cause will be remanded.

In Equity.

*W. C. McCall*, for complainant.

*Chisholm & Erwin*, for defendants.

SPEER, J. This bill is brought for the purpose of enjoining a levy made by the sheriff of Brooks county, Georgia. It was brought in the state court and removed to this court. The allegations are that the complainant, in 1873, filed his petition in voluntary bankruptcy in the district court of the United States, Southern district of Georgia; that he was subsequently adjudged a bankrupt; that he set out all his property in the schedule annexed to his petition; and that the tract of land levied upon was so included, and was set apart to him by the register as exempt under the homestead laws of Georgia. The complainant alleges that he placed in his bankruptcy schedule the judgment of Allen & McLane for \$1,301.68. On this judgment a *fi. fa.* issued, under which the sheriff is proceeding to sell his homestead exemption. The judgment was obtained in the superior court of Brooks county, in the year 1867. This was before the homestead law of Georgia was enacted. Allen & McLane did not prove their claim in bankruptcy, but relied upon the lien of their judgment. The complainant insists that the judgment of Allen & McLane was provable in bankruptcy, and, not having been so proven, he is discharged from all liability thereunder. He further insists that his discharge in bankruptcy is effective to relieve his property from the liens of the judgment, and prays that the sheriff and the plaintiff in execution be enjoined from proceeding with the levy and sale.

A motion is made to dismiss or remand the bill for want of jurisdiction,—all parties thereto being citizens of the same state; and it is replied that the court should maintain jurisdiction, because it is necessary, in the determination of the issues involved, to construe an act of congress. It is very clear, on the authority of *Jeffries v. Bartlett*, 20 Fed. Rep. 496, and *Adams v. Crittenden*, 4 Woods, 618, S. C. 17 Fed. Rep. 42, that this court has no jurisdiction to consider the matter set out in this bill. The court properly vested with jurisdiction in such matters is the district court; and yet that court, where exempted property has been set apart, has no further concern in the matter, and has no jurisdiction to defend such property against ad-

v.26f.no.10—46

verse liens, whether they may or may not have been extinguished by the bankruptcy.

This is not a "suit of a civil nature," "arising under the constitution or laws of the United States," in the meaning of the act of March 3, 1875. It is in fact a suit between citizens of the state, and to be determined by the laws of the state, and in the state courts. In the case of *Wolf v. Stix*, 99 U. S. 1, on which counsel for complainant relies, there was no lien in existence prior to the application for bankruptcy. The case of *Brazelton v. De Graffenreid*, removed from the superior court of Mitchell county, Georgia, wherein a decree was rendered by his honor, Judge ERSKINE, November 13, 1879, (not reported,) was, it is true, analogous to the bill before the court. Upon an examination of the record in that case it will appear, however, that it was determined after a decree *pro confesso*, and, the court is inclined to think, was neither argued nor resisted. In the case of *Arnett v. Mosely*, decided December 4, 1879, by Judge ERSKINE, the issue was precisely as made here, and on motion the cause was remanded. With regard to the case of *Gibson v. Williams*, (decree in this court,) the parties were citizens of different states, and the case was properly removable, and, while no opinion was filed, I presume that jurisdiction was entertained by the presiding judge because of the citizenship of the parties.

While having a very decided opinion upon the merits of the application, the court, having no jurisdiction to entertain the subject, will remand the record to the court from whence it came, to be there determined.

---

### SHARON v. HILL.

(Circuit Court, D. California. April 21, 1885.)

#### EQUITY—PLEA IN ABATEMENT TO JURISDICTION—CITIZENSHIP—DECISION FINAL.

Complainant filed a bill as a citizen of Nevada against defendant, a citizen of California, in the circuit court for the district of California. Defendant filed a plea in abatement, alleging that complainant was a citizen of California, whereupon complainant filed a replication, and the issue of citizenship upon hearing was decided in favor of complainant. Defendant then filed an answer to the merits of the case, and also denied that complainant was a citizen of Nevada. A replication was filed and testimony taken, and subsequently, pending the examination of witnesses, defendant offered to show by affidavits that complainant was in fact a citizen of California. *Held*, that the determination of the issue as to citizenship on the plea in abatement was conclusive, and could not be raised and determined again on affidavits or upon the denials in the answer.

In Equity.

William M. Stewart, for complainant.

D. S. Terry, for defendant.

SAWYER, J. I have before had occasion to consider and pass upon the question of jurisdiction in this case, and my convictions on the subject, as I have two or three times expressed them, are very clear. Still, as the point was again raised on this motion, I felt willing to hear further argument of counsel to see if anything new could be presented. I am satisfied that the question of jurisdiction was finally determined for this case upon the plea in abatement. Under the law, as it existed before the passage of the act of March 3, 1875, the question of the citizenship of the parties to a suit could only be raised by a plea in abatement, as decided by the supreme court in not less than a dozen cases. *Smith v. Kernochen*, 7 How. 216; *D'Wolf v. Rabaud*, 1 Pet. 476; *Jones v. League*, 18 How. 81; *De Sobry v. Nicholson*, 3 Wall. 421; *Coal Co. v. Blatchford*, 11 Wall. 177; *Wickliffe v. Owings*, 17 How. 51, 52; *Livingston v. Story*, 11 Pet. 351; *Sheppard v. Graves*, 14 How. 505; *Same v. Same*, Id. 512, 513. So, the thirty-ninth equity rule prescribed by the supreme court excludes from the general answer to the merits "matters of *abatement*, objections to the character of the parties, and to matters of form." Eq. Rule 39; *Wickliffe v. Owings*, 17 How. 51, 52. The supreme court has not modified or amended equity rule 39 since the passage of the act of 1875 which was 10 years ago. This indicates that in its opinion the act does not affect the practice of courts of equity in this particular. The court would not be likely to retain a rule so long which it supposed had been abrogated by an act of congress. Upon that plea it has been repeatedly held that the burden of proof is on the defendant. *De Sobry v. Nicholson*, 3 Wall. 423; *Sheppard v. Graves*, 14 How. 505; *Same v. Same*, Id. 512, 513. No decision of the supreme court made since the passage of that act as to whether this jurisdictional question may be raised in the general answer where it has not in fact been otherwise presented has been brought to my notice by counsel, and it has not been very clear to my mind what the ruling of the supreme court would be were that point so presented. In my opinion, however, the former decisions should be followed still.

If the question can be raised upon affidavits at this stage of the case, it can again be raised in any subsequent part of the proceedings, and on indefinitely. Or, if it can be raised again in the general answer to the merits, there would be no use of a plea in abatement. Such a plea upon that practice would only obstruct and prolong the proceedings, without any possible advantage to be gained thereby. The parties are entitled to have an issue once tried and determined. If through negligence or otherwise they do not present their evidence, the fault is their own, and they must abide the consequences.

I have no doubt that where a party does put in a plea in abatement to the jurisdiction, and the issue so raised by the plea is tried and determined upon sufficient pleadings as to form and substance, it is determined for the case, and the question cannot again be raised.

It seems to me to be perfectly clear upon principle that such is the case. And the practice is so settled by the supreme court in *Grand Chute v. Winegar*, 15 Wall. 371, wherein it is held that "a party having his plea in abatement passed upon by a jury and found against him is not permitted to set up the same matter in bar, and again go to the jury upon it." The question is by no means new to me; and in consequence of the doubt above expressed, *where no plea in abatement is interposed*, this court, in January, 1882, amended rule 9 of its rules of practice so as to read as follows:

"**RULE 9. *Matters in Abatement.*** All matters in abatement shall be set up in a separate preliminary answer, in the nature of a plea in abatement, to which the plaintiff may reply or demur; and the issue so joined shall be determined by the court before the matters in bar are pleaded. And when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar, or to the merits, or simultaneously with an answer of matter in bar, or to the merits, the matter so pleaded in abatement shall be deemed to be waived. When the matter so pleaded in abatement consists of matters of fact, the plea or preliminary answer shall be sworn to. And when matters showing that the court has no jurisdiction, which might have been pleaded in abatement, are first developed during the proceedings in the cause upon the merits, the court will, upon its own motion, dismiss or remand the case, in pursuance of the requirements of section 5 of the act of March 3, 1875, and, in its discretion, tax the costs of such proceedings upon the merits so far as is practicable to the party most in fault in not presenting such matters in some proper mode, before proceeding upon the merits."

Undoubtedly, it was entirely competent for the court, there being no statute to the contrary, to establish a rule providing that matters in abatement shall be presented and tried, before going into the merits. The object of such a rule is to provide that jurisdictional and other questions of this character shall be first tried and determined, and not to admit of such questions being raised toward the end of a trial, after an extended examination or a tedious trial of the cause upon the merits. In this case counsel evidently understood that the question of citizenship should be so raised and determined, and it was in fact pleaded in abatement. No testimony was put in under the plea; and under the ruling of the supreme court that the burden was on the defendant to establish her plea the plea was adjudged to be false, and overruled for want of evidence to support it. I have regretted that the issue raised by that plea was not tried and disposed of upon evidence duly taken. But the plea having been interposed and regularly disposed of, an answer upon the merits having been afterwards put in, replication filed, issue joined, and the examination of witnesses having been proceeded with for two months, I am satisfied that this question is not now open to examination in any form.

It would be improper to go back and reopen this matter now, so long after it has been regularly determined for the case. No application was made to reopen that issue after the decision upon the

plea. Even if the court had authority, in its discretion, to reopen the issue after the decision, and before answer to the merits filed—upon which point I express no opinion—it would be improper to do so now. The time within which defendant should answer was liberally extended, and an answer upon the merits filed, issue joined, and testimony taken. It would be an abuse of discretion, if any such discretion there be, to reopen that issue.

The alleged marriage contract, as set out in the bill, both the part signed by the defendant, as well as that purporting to be signed by complainant, represents the complainant as being of the state of Nevada and defendant of California. As a matter of general public history we all know that complainant, during the time covered by the affidavits, was recognized by the state of Nevada as being a citizen of that state, and elected as such to represent the state in the United States senate, and that he was serving as such senator at the date of the alleged contract. The proper citizenship is alleged in the bill, and the issue upon that point raised by the plea to the jurisdiction was regularly determined in favor of complainant. Although in the general answer to the merits defendant has denied that complainant is a citizen of another state, as alleged in the bill, yet as the issue has already been determined on the plea to the jurisdiction on that ground, in my judgment testimony is inadmissible at this stage of the case to prove the issue thus attempted to be again raised. At all events, if that question is still open it is one of the issues to be tried in the case upon the evidence, and cannot be raised upon affidavits on a collateral motion to affect proceedings upon the issue on the merits. If I am wrong in my judgment that the question is not now open to further investigation, and that testimony upon this issue is inadmissible, my error will be corrected, and the matter authoritatively determined by the supreme court. I am, however, clear in my conviction that whatever might have been the result under the act of 1875, had no plea in abatement been filed and the issue taken thereon regularly determined, such a plea having been interposed and having been regularly determined, the question thereby raised is finally and conclusively adjudged for this case, and cannot be again opened and retried at any subsequent stage of the proceedings in the case.

The provision of section 5, that "if it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought," that it does not involve a controversy properly within its jurisdiction, it shall be dismissed, doubtless means when it shall appear in some proper mode or form recognized by the rules and established practice of the courts it shall be dismissed. It does not mean that the objection may be suggested *ore tenus*, or by affidavit, or in any other manner outside the regularly established course of practice of the court. It often happens that the defect regularly appears in the record, as when there is a want of proper allegations in the

bill or complaint, but it has not attracted the attention of the court. Whenever this is the case, or where the defect is made to appear to the court in any stage of the proceedings in its regularly established course of practice, the court must dismiss the case. This was always the rule, and the statute but gives express sanction to it, and requires its enforcement by the court, *of its own motion*, whether counsel suggest it or not, without attempting or professing to change the regularly established forms of procedure by which the defect shall be properly made to appear. It is as important now to determine the question of jurisdiction upon a plea of abatement before going into the merits at large, as it ever was. Any other practice would be extremely inconvenient, and often oppressive. I see no satisfactory indication of an intention on the part of congress to change the practice in this particular. But however this may be, the fact as to the citizenship of complainant can only be determined upon testimony presented upon issues properly framed, in pursuance of the regular practice of the court.

The affidavits and other evidence offered on the question of citizenship relate to the residence of complainant, and it is claimed that the mere residence in any state of a citizen of the United States, under the fourteenth amendment to the national constitution, makes him a citizen of the particular state in which he resides, and that if complainant is a resident he is also a citizen of California. My own judgment is that the provisions of the fourteenth amendment to the constitution have not so changed the law as to make a man necessarily against his will a citizen of the state in which he is residing. It doubtless gives him the right to claim citizenship of such state, but as I think does not compel him to abandon the citizenship of the state of his birth or adoption, and adopt the citizenship of the state in which some exigencies of his business or his pleasure induce him to fix his present residence.

A party may have property and various interests in different states, and his interests in some respects may well require him to retain his original citizenship in the state where he was born, or of his adoption, while other interests may be promoted by a residence in some other state. The question whether a party has a right to be a citizen of the state in which he resides is a very different one from the question whether he is compelled, willing or unwilling, to abandon his citizenship of the state of his choice, and become a citizen of the state in which he resides, whatever his interests may require. It may be that where a person establishes his domicile in a state he is *prima facie* a citizen of that state, but that the question of his citizenship is not absolutely concluded by the fact of residence temporary or otherwise. My impression is, as I have stated, that a man may elect to remain a citizen of a state of which he has become a citizen, and yet actually afterwards change his residence to another state, without necessarily affect-

ing his citizenship. And this seems to be the view of the supreme court of the United States, as that tribunal has several times, since the adoption of the fourteenth amendment, held that an averment of residence in a particular state, even of a citizen of the United States, is not an averment of citizenship of that state. In *Robertson v. Cease*, 97 U. S. 649, this point was made in the argument of counsel and noticed by the court. In deciding the point that an averment of residence in a state is not an averment of citizenship of that state, even since the adoption of the fourteenth amendment, the court observes: "Those who think the fourteenth amendment requires some modification of those rules claim, *not that the plaintiff's residence in a particular state necessarily or conclusively proves him to be a citizen of that state, within the meaning of the constitution, but only that a general allegation of residence, whether temporary or permanent, made a prima facie case of right to sue in the federal courts;*" and in *Grace v. American Cent. Ins. Co.*, 109 U. S. 284, S. C. 3 Sup. Ct. Rep. 207, the court says in express terms that "they may be doing business in *and have a residence in New York, without necessarily being citizens of that state.*" But, under the views taken as to the conclusiveness of the determination of the question of citizenship upon the plea in abatement, for the purposes of this suit, it is not now necessary to definitely decide that important question. Did the question arise upon issues regularly framed in pursuance of the practice of courts of equity, the complainant could of course be entitled to introduce opposing testimony. But it does not now so arise. The objection on the ground of want of jurisdiction, as now presented, is overruled.

---

### UNITED STATES MORTGAGE CO. v. SPERRY and others.

(Circuit Court, N. D. Illinois. September 12, 1885.)

#### 1. MORTGAGE—INTEREST COUPONS—INTEREST AFTER MATURITY.

In Illinois a mortgage note or bond bearing interest at a given rate continues to bear that rate of interest so long as the principal remains unpaid.<sup>1</sup>

#### 2. SAME—COUPONS, WHEN DRAW INTEREST—COMMERCIAL PAPER—"WRITTEN INSTRUMENTS"—REV. ST. ILL. CH. 74, § 2.

Coupons given by a guardian for installments of interest on a mortgage on the ward's land that are not so worded as to bind the guardian or the ward personally will not draw interest after they become due as commercial paper or as "written instruments," within the meaning of Rev. St. Ill. c. 74, § 2.<sup>2</sup>

### In Equity.

<sup>1</sup> See note at end of case.

<sup>2</sup> The past due coupons of municipal bonds bear interest at the rate fixed by the law of the place where they are made payable. *Town of Pana v. Bowler*, 2-Sup. Ct. Rep. 704.

*Dexter, Herrick & Allen*, for complainant.

*Lyman Trumbull, J. V. Le Moyne, and Henry Crawford*, for defendants.

GRESHAM, J. The first two mortgages, dated July 10, 1872, and April, 1873, to secure loans of \$175,000 and \$70,000 respectively, were executed by Anson Sperry as guardian of Henry W. Kingsbury. The money was borrowed to enable him to rebuild on his ward's real estate, and to pay off incumbrances thereon. Heman G. Powers, as guardian, executed a third mortgage on December 1, 1876, to secure a loan of \$95,000. This amount was needed to pay off overdue interest on the preceding mortgages, and an indebtedness incurred by the former guardian in rebuilding. Default having been made in the payment of interest coupons attached to each of the mortgages, the Mortgage company on November 2, 1877, exercised the right given it by the terms of the mortgages of declaring the principal sums due, and a few days thereafter filed its bill to foreclose.

John V. Le Moyne, who at this time had succeeded Powers as guardian, filed an answer averring that the county court had no jurisdiction to authorize the execution of the mortgages for the purposes specified, and denying their validity. The minor became of age December 23, 1883, and in May, 1885, filed his answer, which, in addition to the averments contained in Le Moyne's answer, alleged that the rate of interest contracted for was unauthorized by the charter of the Mortgage company, and that the mortgages were invalid for that reason. The mortgages were decreed to be valid on the tenth day of September last, and the amount due the complainant remains to be determined. (24 Fed. Rep. 838.) The bonds which the three mortgages were executed to secure all drew 9 per cent. interest, with coupons annexed, and in his application to the court for authority to make the third loan and execute a mortgage to secure it, Powers stated the amount of interest due from his ward at the rate of 9 per cent. upon the first two mortgages, and at the same rate on all past due coupons. On this basis \$53,194.27 of the third loan of \$95,000 represented interest.

It is contended for the defendants that when the principal sums became due at the election of the Mortgage company the contract provided no rate of interest, and that thereafter the loans drew the rate allowed by the statute, viz., 6 per cent. It was held in *Ohio v. Frank*, 103 U. S. 697, that the creditor was entitled to the contract rate up to the maturity of the debt, and thereafter the statutory rate, unless a different local rule had been established. It was also held in the same case that a different local rule had been established in Illinois by the supreme court of that state in *Phinney v. Baldwin*, 16 Ill. 108, in which it was decided that a note given for a sum of money, bearing interest at a given rate, continued to bear that rate as long as the principal remained unpaid. The rate of interest, therefore, on the



three loans remained unchanged when the principal sums became due by the election of the Mortgage company.

One of the coupons (all being alike except as to number) reads as follows:

"Due the United States Mortgage Company \$3,150 on the first day of October, A. D. 1873, in gold coin of the United States, payable at such place in the city of Chicago, in the state of Illinois, as the said United States Mortgage Company, their successors, legal representatives, or assigns, shall in writing from time to time appoint, and, in default of such appointment, then at the agency of said company in the said city of Chicago, being for the payment of an installment of interest due on that day on my bond to the said United States Mortgage Company of this date. Conditioned for the payment in gold coin of the United States of \$70,000, with semi-annual interest at 9 per centum per annum on the whole sum from time to time remaining unpaid in gold coin of the United States, said bond being made to secure a loan made to me in like gold coin. Said payments are to be made in gold coin of the quality and fineness of the present standard of the United States.

"ANSON SPERRY,

"Guardian of the estate of Henry W. Kingsbury."

While it is true that a promise in advance in a note or other instrument to pay compound interest will not be enforced, still coupons given by an individual or a corporation for installments of interest to mature on bonds draw interest. This, however, is upon the theory that such coupons are separate instruments, promises to pay to bearer specified sums of money at specified times, and when severed from the bonds to which they are attached possess all the essential qualities of commercial paper. *Gelpcke v. Dubuque*, 1 Wall. 206; *Thomson v. Lee Co.*, 3 Wall. 331; *Aurora v. West*, 7 Wall. 105; *Clark v. Iowa City*, 20 Wall. 583. But these coupons are only such in form. They bind neither the guardian nor the ward personally; in fact they bind no one personally. The bonds and coupons are made a charge upon the ward's real estate, and the holders cannot maintain personal actions on them; their only remedy is in equity to enforce the charge or lien. It is expressly provided in the bonds, the mortgages, and the orders of the court authorizing the guardians to make the loans, that they are not to be personally liable, and if the incumbered real estate proves to be an insufficient security the Mortgage company will have no remedy against the guardians or Kingsbury for the deficiency. It is not pretended that the Mortgage company took the bonds or coupons supposing the guardians were personally liable. The coupons, so-called, are not commercial paper, and they do not draw interest.

Section 2, c. 74, Ill. Rev. St., provides that creditors shall be allowed interest at the rate of 6 per centum per annum on all moneys after they become due on any bond, bill, promissory note, or other instrument in writing. It is claimed that under this statute the coupons are "instruments in writing," and drew interest at the rate of 6 per cent. per annum after they became due. Courts of equity look to the substance and not to the mere form of transactions, and we

have already seen that neither the bonds nor the coupons created any personal liability. The three loans, evidenced as they are by the bonds, coupons, mortgages, and orders of the court, have no other or greater effect than if the county court had authorized the guardian to procure the money to rebuild, charging the ward's real estate with its repayment with interest at 9 per cent., payable semi-annually, and the loans had been made under such authority. At the time the third loan was made, the Mortgage company claimed that there was due it for interest on the principal of the first and second loans and interest on past due coupons, both at the rate of 9 per cent. per annum, \$53,194.27. Powers, the guardian, at this time was a member of the Mortgage company's loan committee at Chicago, thus occupying inconsistent relations; and in his petition to the county court for authority to make the third mortgage, he admitted the correctness of this claim. While it was clear that if there was any foundation at all for interest on the past due coupons the rate should not have exceeded the statute rate of 6 per cent., the guardian seemed more mindful of his duty to the Mortgage company than to his ward, and allowed and paid 9 per cent. It is true this was claimed and allowed as interest on interest, and not as interest on the principal sums, but the excess over 6 per cent. was obviously unjust and illegal. Usury consists in the contracting for, receiving, or reserving a greater rate of interest on the principal sum than is allowed by law; while compound interest is the addition of the accruing interest to the principal, and the taking of interest on this interest. Courts decline to enforce contracts providing in advance for compound interest, not, however, because they are usurious, but on the ground that they tend to oppress the debtor, and are against public policy. Money once paid, however, for compound interest cannot be recovered back; and a note given for the payment of interest on past due interest is valid, and can be enforced. *Kellogg v. Hickok*, 1 Wend. 521; *Stewart v. Petree*, 55 N. Y. 621; *Camp v. Bates*, 11 Conn. 487; *Wilcox v. Howland*, 23 Pick. 167; *Mowry v. Bishop*, 5 Paige, 98; *Otis v. Lindsey*, 10 Me. 315; *Mosher v. Chapin*, 12 Wis. 453.

It is not to be presumed that a court, whose peculiar province it is to protect persons of tender years, would charge an infant's estate with compound interest. It was the order of the county court that gave effect to the contracts, and bound the infant's estate. It is true that the interest on the principal sums became due semi-annually, and that instruments in the form of coupons were attached to the bonds; but this of itself was not sufficient to show that the court intended to charge the estate with interest on the interest installments. It is plain that the Mortgage company demanded and received out of the \$95,000 loan more than was due it as interest on the first and second loans, but it is claimed by counsel for the company that so far as the third mortgage related to interest, it was an agreement to pay the past due interest on the principal of the first and second mort-

gages, and interest on interest installments from the time they severally became due. It is a sufficient answer to this to say that it does not appear from the record that the county court authorized or assumed to authorize the guardian to pay compound interest on the first and second loans.

The third loan embraced compound interest on the first and second loans, and more. The excess over 6 per cent., we have already seen, can be justified on no theory. If the exaction of this excess did not constitute usury, it was because the parties thought 9 per cent. was allowable, and they did not contemplate usury. However this may have been, the court is at liberty to award such relief under the third mortgage as will be equitable. The guardian in his answer denied the validity of the mortgages, and after attaining his majority, Kingsbury filed an answer in which he denied their validity, and endeavored to avoid payment of both principal and interest, although he had received the benefit of the Mortgage company's money. The mortgage company has been obliged to conduct a protracted and expensive litigation. If it had promptly enforced its remedy, the property charged would have been sold when its value was depressed, and for not more than the amount due on the three loans. Fortunately the premises will now sell for a sum largely in excess of the incumbrance. This is an admitted fact. The defendant should, therefore, be required to pay the Mortgage company a reasonable compensation for the use of its money.

Interest will be allowed on the principal sums at 9 per cent., until the ——— of November, 1877, when Mr. Le Moyne was appointed guardian, and thereafter on the third loan at a rate which will be equivalent to  $6\frac{1}{2}$  per cent. on all the loans from the last named date.

#### NOTE.

In *Kellog v. Lavender*, (Neb.) 18 N. W. Rep. 38, notes were given payable in one and two years, with 12 per cent. interest, payable annually, and the court held that the holders thereof were entitled to the rate provided for, after as well as before maturity. The court say: "This view seems to be in accord with the recent decisions of the English courts, as collected by Chief Justice GRAY, in his very able and exhaustive opinion in the case of *Union Institution for Savings v. City of Boston*, 129 Mass. 82. In this case the learned judge cites all the cases, American and English, and reaches the same conclusion as that announced by Mr. Justice FIELD in *Cromwell v. County of Sac*, 96 U. S. 51, that 'the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment.' But the best-reasoned case, it seems to me, is that of *Spencer v. Maxfield*, 16 Wis. 178. The opinion of the court by Mr. Justice FAIRBANKS answers every objection, and leaves it perfectly clear to my mind that the rule as last stated is the correct one, and that none other ought to be adopted in this state."

Where a promissory note by its terms fixes a legal rate of interest per annum, "from date until paid," such note will draw interest at the agreed rate after as well as before maturity, and the judgment or decree rendered thereon will draw the same rate of interest. *Bond v. Dolby*, (Neb.) 23 N. W. Rep. 351.

A promissory note, or other obligation containing an agreement for a special rate of interest, will, after maturity, draw interest only at the statutory rate unless the special rate is expressly agreed to be paid after maturity. *Eaton v. Boissonnault*, 67 Me. 540.

Where there is a uniform rate of interest, and a conventional rate fixed by statute, a contract in writing to pay a debt, with interest at a given rate from a designated date, carries the conventional rate as well after as before maturity. *Overton v. Bolton*, 9 Heisk. 762.

A note payable one day after date, and bearing a conventional rate of interest greater than the legal rate, but containing no provision for the rate of interest after maturity, draws the same rate of interest after as before maturity. *Shaw v. Rigby*, 84 Ind. 375.

A promissory note payable within a year from its date, with a larger than the statutory rate of interest, "per annum, from date," draws only the statutory rate of interest after maturity. *Newton v. Kennerly*, 31 Ark. 626.

A contract to pay a sum certain at a future day, with interest at a conventional rate, nothing being said as to the rate of interest after the principal sum becomes due, bears interest at the conventional rate until it becomes due, and from that time, upon the aggregate of principal and interest, at the legal rate. *Briggs v. Winsmith*, 10 S. C. 133.

In an action upon a contract to pay a sum of money at a certain time, with interest at a specified rate, the creditor is entitled to recover interest at that rate, not merely until the agreed time for payment of the principal, but until it is actually paid or his claim for principal and interest is judicially determined. *Union Institution for Savings v. City of Boston*, 129 Mass. 82.

A contract to pay interest at a specified rate, but silent as to the rate after maturity, draws the conventional rate after maturity. *Meaders v. Gray*, 60 Miss. 400.

A note payable one day after date, at a conventional rate of interest, bears that interest until paid. *Casteel v. Walker*, 40 Ark. 117.

A sealed note, payable 12 months after date, "with interest at 12½ per cent. per annum, interest payable annually," and described in a contemporaneous mortgage executed to secure it as a note, "with interest thereon at the rate of 12½ per cent. per annum till paid," draws the same rate of interest after maturity as before. *Mobley v. Davega*, 16 S. C. 73.

A sealed promissory note, payable six months from date, with interest at the rate of 12 per cent. from date, bears the conventional rate of interest until paid, although not paid at maturity. *Cecil v. Hicks*, 29 Gt. 1.

Where a note is payable on demand, with interest at 10 per cent., that rate of interest is recoverable up to the date of the judgment. *Paine v. Caswell*, 68 Me. 80.

### POLLOCK v. BRAINARD and another.

(Circuit Court, D. Nebraska. March 9, 1886.)

#### 1. EVIDENCE—ANSWER IN EQUITY UNDER OATH—EVIDENCE TO OVERCOME.

In a suit for specific performance of a contract for the sale of land, where defendant, in his answer duly verified, denies that he received a telegram, forming part of the contract, "such as is copied in the complainant's bill;" and complainant testifies that he sent the telegram just as copied in the bill, and produces a copy made by himself at the time of sending it; and defendant, though sworn as a witness, and notified to produce papers, neither produces the telegram actually received, nor says a word about it in his deposition,—all the requirements of equity practice are complied with, and it must be taken as proved that such a telegram passed between the parties, and formed part of the alleged contract.

#### 2. SPECIFIC PERFORMANCE—TENDER—REFUSAL TO PERFORM.

Where a party has flatly refused on his part to carry out the contract, a tender by the other party of performance is not necessary before bringing a suit for specific performance.

#### 3. SAME—CONTRACT TO SELL LAND—EVIDENCE—LETTERS AND TELEGRAMS—CERTAINTY—ACCEPTANCE.

On examination of the evidence and the letters and telegrams forming the contract to sell the land involved in this case, *held*, that the contract was sufficiently certain, that there was an acceptance by defendant of complainant's offer to buy, and that specific performance should be decreed.

In Equity.

*Barnes Bros. and Guy R. Wilber*, for complainant.

*Groff & Montgomery*, for defendants.

BREWER, J. This is a bill for the specific performance of a contract for the sale of real estate. The negotiations were carried on and the contract consummated, if at all, by correspondence. The entire correspondence, and in its chronological order, is as follows:

## EXHIBIT A.

"COLERIDGE, CEDAR CO., NEB., April 8, 1884.

"*Chas. D. Brainard, Peoria, Ill.*—DEAR SIR: Did you ever own the S. W.  $\frac{1}{4}$  Sec. 17, Tp. 30, R. 2 E.? I have a tax deed for the land. It was sold a long time ago. I offered to buy the quitclaim only for the purpose of quieting title and settling a controversy. Mr. Jenel, who assumed to be the agent, would not consider my offer, nor tell me where the owner lived. Mr. C. J. Off thought you might be the man, and if you are, please write and tell me what you would want for a quitclaim. I have 2 teams breaking on it now.

"Respectfully,

W. A. POLLOCK."

Second. Brainard's answer, being—

## EXHIBIT A. A.

"APRIL 16.

"*W. A. Pollock, Esq., Coleridge, Cedar County, Nebraska:* Your favor of 8th at hand, and, owing to my absence from the city for a few days, has not been answered more promptly. Yes, sir; I own the S. W.  $\frac{1}{4}$  17, 30, 2, and would sell my interest in the same. I am aware of your having a tax title to the land, but I do not consider it equal to mine. I would prefer to sell my interest to you, and have no controversy about it. I want \$500 for my interest. Mr. John Comstock, of this city, is now in your vicinity, and has power of attorney to act for me. I would be pleased to hear from you either through him or personally.

"Yours, respectfully,

CHAS. D. BRAINARD."

Third. Pollock's reply to Brainard, being—

## EXHIBIT B.

"COLERIDGE, NEB., April 19, 1884.

"*Chas. D. Brainard, Esq., Peoria, Ill.*—DEAR SIR: Yours of the 16th is before me, and contents considered. I am glad that you are the owner, as you say, of that land. I had been led to suppose I was the owner. I am glad I have a gentleman to deal with in a controversy, and I pride myself on dealing fairly. I will make you an offer for your quitclaim to the S. W.  $\frac{1}{4}$ , sec. 17, 30, 2 E., not because I am afraid of my title, for, if there is a tax title in the state that will hold, this one of mine will. I would sooner give to you than to spend the money at law, and I will make you this and my only offer. You make me quitclaim deed and I will give you \$400 mortgage and my note, payable in one or two years, with 8 per cent. interest, on the same land, which will be just as good as cash to you. You say Mr. Comstock has authority to adjust the matter. I understood Mr. J. P. Johnson to tell Mr. C. J. Off that Mr. C. had been called off somewhere else; at least Mr. C. has not been here yet. Mr. Off can tell you about me. If this proposition is accepted, it must be at once. You can execute the papers, quitclaim, and mortgage and note, and send to Dr. Johnston or Mr. Comstock, and I can execute the mortgage,—close it up. Remember is a compromise measure, and if not accepted is not to prejudice my claim.

"Respectfully,

W. A. POLLOCK."

*Fourth.* Pollock's telegram, being—

EXHIBIT C.

"WAKEFIELD, NEB., 29, 1884.

"*Chas. D. Brainard*: Accept your offer, and pay you five hundred. So west seventeen. Send deed to Bow Valley Bank.

"W. A. POLLOCK."

*Fifth.* Brainard's telegram, being—

EXHIBIT D.

"PEORIA, ILL., April 29, 1884.

"*W. A. Pollock, Wakefield, Neb.*: I notify Comstock to make sale to you, or to return papers to me and I will.

CHAS. D. BRAINARD."

*Sixth.* Pollock's letter confirming his telegram, and refusing to deal with Comstock, being—

EXHIBIT E.

"COLERIDGE, CEDAR COUNTY, NEB., May 4, 1884.

"*Chas. D. Brainard, Esq., Peoria, Ill.*—DEAR SIR: I accepted your offer on S. W.  $\frac{1}{4}$  17, 30, 2 E., and telegraphed you on the 29th, as I was on my way to our state convention, and on my return, four days later, find your answer O. K. I send you a deed to execute, and send to the Bow Valley Bk., Hartington, and your money will be there, spot cash, and no commissions. I have not seen Mr. Comstock yet, but I do not want deed from him under a power of attorney. I use a warranty blank, but make a special warranty excepting the tax deed, and all other taxes, and hope it will be satisfactory. Execute and return immediately. I think Jenel has been trying to speculate off you, and get you into a lawsuit, or make some money of you.

"Respectfully,

W. A. POLLOCK."

*Seventh.* Pollock's letter announcing the commencement of this action, being—

EXHIBIT F.

"COLERIDGE, CEDAR COUNTY, NEB., May 8, 1884.

"*Chas. D. Brainard, Esq., Peoria, Ill.*—DEAR SIR: Your letter of April 16th was received, offering to take \$500 for your claim on S. W., Sec. 17, 30, 2 E., and on April 29th I telegraphed you that I would accept your offer, and pay you the \$500 at the Bow Valley Bk., to which you answered accepted; saying you would instruct Mr. Comstock to deed, or order the papers back and deed yourself. I immediately deposited the money in the Bow Valley Bank. Mr. Comstock refused to deed to me on our contract, and still refuses, unless I would give him \$100 extra, which I will not do. I was obliged to commence an action against you to protect myself. I commenced my action before Mr. Comstock put his power of attorney on record, or made any transfer, and I do not care how many times he sells it. I am in possession under the tax title, and hold it by purchase of the quitclaim of you; and I understand Mr. C. sold it to some parties in Peoria. In fact, I got a telegram today from the parties, as I supposed. You can make the sale as you agreed, or you can let it run, but old John Comstock wont live long enough to see you through with it. He is old now, and the sale to the Peoria parties is a fraud, and it has put the title in bad shape, all of which is a damage, and I am sorry to have make you trouble after I supposed all was arranged satisfactorily.

"Respectfully,

W. A. POLLOCK."

Counsel for defendants claim that, technically, the first telegram, the fourth paper in the foregoing correspondence, is not proved. The sending of such telegram is alleged in the bill. The answer of Brainard, duly verified, denies that he received the telegram "such as is copied in the complainant's bill." That some communication was received by Brainard is evident from the telegram he sent. Pollock testifies that he sent the telegram just as copied in the bill, and produces a copy made by himself at the time of sending. Brainard, though sworn as a witness, and also notified to procure papers, neither produces the telegram actually received, nor says a word about it in his deposition. Under these circumstances all the requirements of equity practice are complied with, and it must be taken as proved that such a telegram passed between the parties and formed part of the alleged contract.

Again, it is alleged that the contract is uncertain and incomplete for want of a definite description of the land. The state is not named, and, for ought that appears, it may refer to some other similarly numbered quarter section in any other state. *Id certum, quod certum reddi potest.* The residence of the writer making the inquiry, the assertion of a tax deed in the two letters, and the alleged conference with the assumed agent, imply a location within the state. The statement in the same letter that the writer then had teams breaking the land, followed by the evidence sustaining such statement, also identifies; and the further statement in the letter in reply, that "Mr. Comstock is now in your vicinity, and has power of attorney to act for me," followed by a production of the power of attorney in which the land is expressly described as in Cedar county, Nebraska, is conclusive as to the identification.

Again, it is insisted that there was no distinct, clear, positive, and unconditional offer and acceptance, so that it can be affirmed that there was a definite and unconditional contract between the parties. I think otherwise. The first letter is an inquiry as to the price at which the owner will sell. The reply affirms a preference for a sale, and says \$500 is wanted for the owner's interest. The third letter contains an offer of \$400. Before any action by the owner on this offer, and before any withdrawal of the notice contained in the first letter from the owner, comes the unconditional acceptance in the first telegram, and asking that deed be sent to Bow Valley Bank, and to clinch the matter is the reply telegram. I do not understand that telegram as authorizing further negotiations. In view of what had passed between the parties, the only fair interpretation is that of a direction to the agent to close the trade, and deliver a deed upon the offer made and accepted, or, in case of his failure so to do, to return papers to the owner, coupled with a further promise to himself make the deed. I have no doubt of a full agreement between the parties at that time. The place named by the buyer, the Bow Valley Bank, as the place for the delivery of the deed, was accepted without objection by the

vendor. Indeed, the place of delivery of the deed was a mere incident to the sale, and not necessarily a vital part of the terms of the contract. The case of *Sawyer v. Brossart*, from the supreme court of Iowa, reported in 25 N. W. Rep. 876, differs from this in wanting the last approving telegram from the vendor. It differs also in this: that the acceptance here does not specify the place of payment, and if, under the offer, payment was necessary at the residence of the vendor, the acceptance was as broad as the offer. Of course, it may be said that the place of delivery implies the same place of payment, and that such was not the condition of the offer. Whatever force there may be in this is all obviated by the confirming telegram from the vendor, directing a delivery personally, by his agent, to the purchaser, and a promise himself to make title if the agent did not.

Still further, the point was pressed that no tender was made before suit, and that before service of process the vendor had conveyed to a *bona fide* purchaser. The facts are these: Mr. Pollock was away from home when the confirming telegram from the vendor was received. After his return, and on the fifth of May, he deposited \$450 in the Bow Valley Bank, where he had already on deposit over \$50. This deposit was general, to his own order, and not special, to apply to the payment for the deed when received. After making the deposit, he met Mr. Comstock, the agent of the vendor, told him of his purchase, and was informed that he could have the land for \$600. Some further conversation followed, the upshot of which was that Comstock claimed to have the selling of the land, and insisted upon \$600. Thereupon, on May 6th, the next day, plaintiff filed a petition in the state court against Brainard alone, asking a decree for specific performance. Brainard being a non-resident, service was possible only by publication. The same day that this petition was filed, and only an hour or two thereafter, Comstock, under his power of attorney, and in the name of his principals, executed and filed for record a deed of the property to one Jacob Darst, of Peoria, Illinois, the place of residence of both Brainard and Comstock. The consideration was \$500, and not \$600, the sum he demanded of Pollock. This deed to Darst was not in pursuance of any special contract therefor, but by virtue of a general understanding, as Comstock says, that whenever he found a piece of land cheap, and a speculation, he was authorized to purchase it for Darst. He telegraphed Darst to pay the \$500 to Brainard, which he did. On May 10th Brainard and wife personally executed a further deed to Darst, and on June 14, 1884, about a month thereafter, Darst and wife conveyed the premises to Comstock for the same consideration. Thereafter, by amendment, Comstock was made party defendant, and both he and Brainard have appeared and answered. Now, upon these facts, I remark that no tender was necessary because of a flat refusal to perform the contract, and a disabling himself, by the vendor, of the



power to perform by conveying to another. While the conveyance may not have been made until an hour or two after the filing of the petition, yet the demand of \$600 by the agent as a condition of a conveyance was tantamount to a repudiation of the contract, and that was before any suit. Brainard's subsequent contract in receiving the \$500 from Darst, and executing a personal deed, was a ratification of the acts of his agent, and related back to the time of such acts. Darst was no *bona fide* purchaser. If he was anything more than a tool of Comstock, which seems doubtful, Comstock was his agent to buy, and the knowledge of the agent was his knowledge.

Finally, counsel urge that there is no equity in enforcing the contract, and says: "Observe Pollock's method in his attempt to procure 160 acres, of \$10 per acre, Nebraska land, for \$3, or dollars for cents." I think few cases arise in which specific performance is more equitable and just. The price was named by the vendor. Mr. Pollock told him he had a tax title, and claimed that it was good, but the vendor knew beforehand of this tax title. Whether it was good or not is undisclosed. It may, for aught that appears, have been a perfect title. At any rate, there was no concealment—no misrepresentations—by the purchaser; and the vendor freely fixed his price. More than that, he finally took just that price from another. Comstock, who, on the 5th, talks as though Brainard ought to have \$600, hastens the next day to sell the land for \$500. I cannot resist the conviction that Comstock was seeking to speculate off his principal, and wanted to pocket \$100 himself, and that, finding himself baffled in his scheme, sought revenge by conveyance to Darst. I am satisfied to know that the burden of this litigation is to rest upon him.

A decree will be entered in favor of complainant, quieting his title as against Brainard, and, upon the payment of \$500 into the registry of this court, perpetually enjoining the ejectment suit brought by Comstock, and compelling conveyance from Comstock to complainant in specific performance of the original contract.

---

WITTERS, Receiver, etc., v. FOSTER, Adm'r, etc.

(Circuit Court, D. Vermont. March 13, 1886.)

1. ACTION—SURVIVAL OF—REV. ST. § 955.

The laws of the United States prescribe methods only for reviving suits that do survive, but do not prescribe what suits shall survive.

2. SAME—REVIVOR OF ACTION AGAINST DIRECTOR OF NATIONAL BANK FOR NEGLECTED PERFORMANCE OF DUTY—VERMONT STATUTES.

Under the laws of Vermont an action against a director of a national bank for negligent performance of duty in not requiring a bond from the cashier, and otherwise mismanaging the affairs of the bank, abates by his death, and cannot be revived against his administrator.

In Equity.

*Chester W. Witters*, for orator.

*Albert P. Cross*, for defendant.

WHEELER, J. This is a bill of revivor. The original bill charged the intestate, in connection with others as directors of the bank, with neglect of duty in not requiring a bond of the cashier, and in not holding meetings and appointing committees and receiving reports as required by the by-laws; in allowing persons to become indebted to an amount exceeding one-tenth of the capital; and in reckoning assets as good as a basis of dividends, when they were in fact worthless, contrary to the provisions of the statutes. Sections 5200, 5202, 5204.

Objection is made to reviving the suit upon the grounds that the court has not jurisdiction since the act of June 3, 1882, and that the cause of action does not survive. The cause of action rests upon the requirements of the laws of the United States, and by-laws made pursuant to such laws, and therefore is one arising under those laws, jurisdiction over which is not taken away by that act.

The important question is whether the cause of action survives. This question is to be determined by the law of the state of Vermont, where the bank was situated and the intestate died. *Henshaw v. Miller*, 17 How. 212. The laws of the United States prescribe methods only for reviving suits that do survive, but do not prescribe what suits shall survive. Rev. St. § 955. The statutes of Vermont applicable to this case provide that actions of trespass and trespass on the case, for damages done to real or personal estate, shall survive. Rev. Laws, § 2133. This statute is not any more broad than the English statute of 4 Edw. III. c. 7. *Barrett v. Copeland*, 20 Vt. 244; *Dana v. Lull*, 21 Vt. 383; *Bellows v. Allen*, 22 Vt. 108; *Winhall v. Sawyer*, 45 Vt. 466; REDFIELD, J., *Manwell v. Briggs*, 17 Vt. 176.

The ground of the orator's claim against the intestate was his personal and official guilt, not the misappropriation or misapplication of any property of the bank in his possession, nor the interference by him with any property of the bank in possession or in action, but the omission of duties which, if performed, might benefit the assets of the bank. In *Hambly v. Trott*, Cowp. 372, Lord MANSFIELD said: "All private criminal injuries or wrongs, as well as public crimes, are buried with the offender." There are many cases under such statutes where it is held that actions resting upon such personal wrong-doing, although followed by pecuniary damage, do not survive. *Baily v. Baily*, 1 T. Raym. 71, which was for neglect to return a cow taken for agistment; *Stebbins v. Palmer*, 1 Pick. 71, which was for breach of promise of marriage; *Holmes v. Moore*, 5 Pick. 257, which was for diverting water from a mill; *Read v. Hatch*, 19 Pick. 47, which was for fraudulently recommending a trader to credit; *Barrett v. Copeland*,

20 Vt. 244, which was for making a false return as constable; *Henshaw v. Miller*, 17 How. 212, which was for a false representation as to credit; and *Winhall v. Sawyer*, 45 Vt. 466, which was for unlawfully transporting a pauper into a town to charge the town with her support. There are no cases which have been cited or noticed that are really to the contrary. In *Dana v. Lull*, 21 Vt. 383, which was for neglect of a deputy-sheriff in not keeping property attached on a writ to respond to the execution, the deputy had the specific property in his hands which he was in duty bound to keep; and in *Bellows v. Allen*, 22 Vt. 108, which was for not paying over money by a deputy-sheriff collected on an execution, the deputy actually had the money in his hands and detained it. There was an acquisition by the deputy at the expense of the other party in each case.

The cause of action does not appear to survive by the laws of Vermont, as now understood. Bill of revivor dismissed.

---

### *In re HUNT, etc., Bankrupt.*

(District Court, D. New Jersey. March 1, 1886.)

#### 1. CONTRACTS—WAGERING CONTRACTS—RULE IN NEW JERSEY.

All contracts for speculation in stocks upon margins, where the broker and the customer do not contemplate or intend that the stock purchased or sold shall become or be treated as the stock of the customer, but the real transaction is the mere dealing in differences between prices,—that is, in the payment of future profits or losses, as the event may be,—are contracts of wager, in New Jersey, because they depend upon a chance or casualty, and are void.

#### 2. BANKRUPTCY—DISCHARGE—GAMBLING IN STOCK IN ANOTHER STATE.

Where a bankrupt has failed by reason of wagering contracts in stock speculations in another state, he will not be entitled to his discharge in New Jersey, where he resides.

#### 3. SAME—FAILURE TO KEEP PROPER BOOKS OF ACCOUNT.

Where a merchant drew large sums of money from his business, from time to time, to use in stock speculation, and put slips of paper, with the amounts so withdrawn, in the money drawer, as *memoranda* for his book-keeper, so that when he failed his cash-book showed a balance of thousands of dollars which did not exist, his discharge as a bankrupt will be refused, on the ground that he did not keep proper books of account.

On Specifications against Discharge.

*A. G. Richey & Son*, for opposing creditors.

*J. M. Williamson*, for bankrupt.

NIXON, J. Twelve specifications have been filed against the bankrupt's discharge. I have examined them with care, and have no difficulty in overruling all of them except two, to-wit, the third, charging him with gaming, and the ninth, alleging that he did not keep proper books of account.

1. The bankrupt was largely engaged in stock operations during the summer and fall of 1877. His losses, according to his own state-

ment, were from \$150,000 to \$200,000. He describes the manner of conducting these operations in Philadelphia and New York, as follows :

"In Philadelphia, where buying or selling 'puts' or 'calls,' or settling differences, is considered gaming, my transactions in stock were genuine purchases and sales. I would go to my broker, and would deposit a certain amount of money, which we would agree upon; he furnishing the balance. He would then go into the board of brokers, and buy the stocks I wanted; he holding the stocks as collateral for the amount of money advanced by him, to pay for the same. If the price of the stock went down, he would call on me to pay off part of my loan to protect him. In the sale of stock, that is, when I wanted to sell a stock short, I would go to him in like manner, give him a certain amount of money; he furnishing the difference required. He would then go and borrow the stock from some broker or institution, and take it, per my order, to the exchange and sell it. When I got ready to cover that short sale, I would give him the order to buy it, which, after he did it, he would take the stock and deliver it again to the party he had borrowed it of, receiving back the amount of money that the parties held for the return of the stock, and would deduct the amount he had loaned me, with interest and commissions; and the balance he would return to me, which would show my profit or loss, as the case might be, which in most cases would be a loss. In New York my stock operations were conducted upon the same general plan, with one exception, which was dealing in 'puts' and 'calls.' \* \* \* On a few occasions there, after making my purchase or sale of stocks, which were conducted the same as in Philadelphia, I would have my broker call on Mr. Russell Sage to buy a 'put' or 'call,' as the case might require, to limit any loss I might make on the stock bought or sold."

The method of purchasing, as thus described, is what is technically called a purchase on a margin. All contracts for speculations in stocks upon margins, when the broker and the customer do not contemplate or intend that the stock purchased or sold shall become or be treated as the stock of the customer; but the real transaction is the mere dealing in differences between prices,—that is, in the payment of future profits or losses, as the event may be—are contracts of wager in New Jersey, because they depend upon a chance or casualty. It was so held in a recent case (*Flagg v. Baldwin*, 38 N. J. Eq. 219) by the court of errors and appeals, and the court refused to enforce such a contract, although made in New York, where they are enforceable; holding that there was no rule of comity which required them to violate the public policy of the state on the subject of betting and gambling.

I know that the bankrupt insists that he made a purchase of the stocks, and that their retention by the broker was simply collateral, to secure to him the repayment of the amount above the margin advanced by him in the purchase. But was that the essence of the transaction? Was it practically anything more than a mode of adjusting the differences between prices from time to time,—a device, in fact, to escape the peril of violating the laws against gaming? But if this is not so in regard to the buying and selling of stocks, can he—a resident of New Jersey, and chiefly carrying on his business in Pennsylvania—be allowed to go into another jurisdiction, and deal

in "puts" and "calls," and escape the charge and penalty of gaming because such dealings are valid and enforceable by the *lex loci contractus*, although reckoned gaming by the laws of the state of his residence, and of the state where his ordinary business was transacted? I do not, however, propose to rest the refusal of a discharge upon this specification.

2. In section 5110 of the Revised Statutes of the United States are set forth the grounds, upon the proof of any of which, a discharge must be refused. These provisions are 10 in number, and the seventh specification in the pending case is founded on the seventh subdivision of the section, to-wit, that the discharge cannot be granted "if the bankrupt, being a merchant or tradesman, has not at all times after March 2, 1867, kept proper books of account." This is the only one of the provisions which does not involve a fraudulent intent. The discharge must be withheld, irrespective of the intent, if the bankrupt has failed in this respect. During the last six months before his insolvency, his cash-book did not reveal his real pecuniary condition. He tells us that he was at this period in the habit of drawing thousands of dollars from his oil-cloth business to use in his stock speculations; that he would have no entry made upon any of his books of account of this withdrawal of capital, but would write upon a slip of paper, "Due from William R. Hunt," \$——, stating the amount taken, and put it in his money drawer as a memorandum for his book-keeper to settle by. When he stopped business in December, 1877, these slips were gathered together, and aggregated \$25,979.

I do not regard such a course of proceeding as keeping proper books of account. They do not speak the truth. His cash-book revealed a balance of many thousands of dollars which did not exist, and which he had in fact lost in stock speculations. I do not say that he intended to deceive or defraud his creditors. It is not necessary to say that. I will rather accept his statement that he expected to return the money to his business, and that he hoped to have a "lucky streak" in his speculations which would enable him to do so. But the lucky streak did not come. His notes went to protest for lack of funds, and when he succumbed his cash balance was nearly \$26,000 less than his books of account showed.

The discharge must be refused.

**MAYER, Surviving Copartner, etc., v. GOURDEN and another, Assignees, etc.**

(*District Court, S. D. Georgia, E. D. November, 1885.*)

**1. BANKRUPTCY—DISCHARGE—SETTLEMENT WITH CREDITORS AND APPOINTMENT OF TRUSTEE.**

A settlement with their creditors by the members of a bankrupt firm, under section 5103 of the Revised Statutes, where trustees are appointed by a vote of the creditors, is in lieu of the usual proceedings in bankruptcy, and a discharge obtained thereby is complete and final.

**2. SAME—POWER OF COURT TO APPOINT ASSIGNEE.**

Where the debts of the bankrupt firm are settled with such trustees, the trustees have settled with the creditors, and have been themselves discharged, and the bankrupts are discharged, the bankrupts are entitled to a remaining surplus of their estate; and, in the absence of such representations of fraud or mistake as would vitiate the discharge, the district court has no authority to appoint an assignee to take possession of such surplus.

*In Bankruptcy.*

*W. W. Frazier and Jackson & Whatley, for plaintiff.*

*Geo. A. Mercer, for defendants.*

**SPEER, J.** It appears from the record in this case that Ketcham & Hartridge, a banking firm of the city of Savannah, were indebted to S. Kaufman & Co., partners, in the city of New York. Ketcham & Hartridge were adjudged bankrupts, in this court, on June 17, 1873, and have received their discharge. Gourden & Young were their assignees. After settling with the creditors of Ketcham & Hartridge it appeared that Gourden & Young had in their possession \$2,095.02, which was the percentage of the assets of the bankruptcy belonging to the firm of S. Kaufman & Co. It also appears that Kaufman & Co. were adjudged bankrupts in the district court of the United States for the Southern district of New York, and that trustees were appointed, under section 5103 of the Revised Statutes of the United States, to settle the indebtedness of the firm. The trustees of Kaufman & Co. performed their duty, and, depositing in the registry of the court in New York a gross sum for the several creditors, were discharged by the register from all further duty to the creditors. This was done on the third of May, 1874. On the sixth of October, 1875, the district court of the United States, Southern district of New York, the Honorable SAMUEL BLATCHFORD, district judge, presiding, granted a discharge in bankruptcy to Charles H. Kaufman; having previously, on the eighteenth day of September of the same year, granted a discharge to Henry Mayer and Samuel Kaufman, copartners. No assignee had been appointed for Kaufman & Co. prior to their discharge; the action of the trustee, under section 5103 of the Revised Statutes, having been substituted in lieu of the usual proceedings in bankruptcy.

In May, 1884, Gourden & Young, assignees of Ketcham & Hartridge, filed a petition in the district court here, in which they recited

the fact that at an adjourned meeting of the creditors of said bankrupts, on the twenty-second of June, 1881, before the register, they submitted to the creditors the proposition to pay to them  $2\frac{1}{2}$  per centum as a dividend on their respective claims, such dividend to be in full settlement, with the understanding that the assignees should be permitted to retain the remainder of the assets, real and personal, in settlement of their compensation as assignees. This proposition was accepted by the creditors, with the exception of three or four, among whom was S. Kaufman & Co.; that the dividend of  $2\frac{1}{2}$  per cent. was placed to the credit of S. Kaufman & Co., and amounted to \$2,095.02. The assignees further recite that after diligent effort they were unable to find S. Kaufman & Co., or any of them; that they could not reach them through the mails, and could find nobody representing them. They therefore pray that the amount awarded to S. Kaufman & Co. be paid to them, as assignees, as a part of their compensation, it being unclaimed. The prayer in this petition was denied by the Honorable JAMES W. LOCKE, judge presiding, June 3, 1884, and in the order denying the prayer, the register was instructed to discover the persons lawfully entitled to the fund in question.

On January 4, 1886, Henry Mayer, of the city of Chicago, filed his petition in the district court, reciting the fact that he was the surviving copartner of the firm of S. Kaufman & Co.; that the members of said firm, subsequently to adjudication in bankruptcy of the firm of Ketcham & Hartridge, were also adjudged bankrupt; that the proceeding in bankruptcy wherein they were so adjudged has been entirely disposed of; that the debts of S. Kaufman & Co. had been settled, and their trustees discharged, and that the fund of \$2,095.02, in the hands of the assignees of Ketcham & Hartridge, should be paid to petitioner as surviving copartner of Kaufman & Co. A rule *nisi* was granted on this petition, directing Gourden & Young, the assignees of Ketcham & Hartridge, to show cause why said sum should not be paid to the petitioner. Their answer to this rule sets forth substantially the facts alleged in petition to Judge LOCKE before referred to, and they ask that if they are not to retain this sum, that the court will direct to whom it shall be paid.

On the hearing of said rule, John L. Platt, of New York, by counsel, appeared before the court, and claimed the fund as the assignee of Kaufman & Co. He produced a paper purporting to be an order signed by the Honorable ADDISON L. BROWN, district judge of the Southern district of New York, dated on the \_\_\_\_\_ day of \_\_\_\_\_, 1886, and, after the rule *nisi*, directed to the assignees of Ketcham & Hartridge, was granted, appointing him as such assignee. The form of the order, and the manner of his signature, would appear to indicate that it was signed by the clerk of the district court, on the request of the assignee. Certainly no bankruptcy proceeding was pending against Kaufman; the debts of that firm had been settled

by trustees; their action was regular, under the statute, as before stated, in lieu of other proceedings in bankruptcy; the trustees had been settled with, and discharged; and all the members of the firm of Kaufman & Co. had received their formal discharge. Clearly, therefore, to appoint an assignee in bankruptcy for Kaufman & Co. was a proceeding *de novo*, and a proceeding without warrant of law, for the bankrupt law had been repealed by act of congress. Platt, therefore, who claims to act as assignee, could have no right to this fund. The claim of the assignees of Ketcham & Hartridge, that the sum is to be regarded as a surplus, and a part of their compensation, is quite as untenable. As to them it had already been adjudicated by his honor, Judge Locke, unfavorably, and, besides, their claim is placed upon the ground that Kaufman & Co. could not be found. This difficulty is now obviated. Kaufman & Co., through their surviving copartner, are properly entitled the owners of this fund, and to them the court will direct it to be paid. It appears, however, that the assignees of Ketcham & Hartridge have retained counsel, and taken advice with regard to the disposition of this sum. They are entitled to be reimbursed for expenditures in this behalf, and the fund is also properly liable for the costs of this proceeding.

---

### UNITED STATES *v.* HEARING.

(Circuit Court, D. Oregon. March 22, 1886.)

1. PERJURY—SECTION 2294, REV. ST.

An applicant for the entry of land, under the homestead act, may make oath to the excusatory facts that authorize him to verify the affidavit accompanying his application, before the clerk of the county, as provided in section 2294, Rev. St., and if such oath is willfully and knowingly false in any material particular, or includes a statement of fact which such applicant did not believe, he is guilty of perjury as defined by section 5392, Rev. St.

2. SAME—INDICTMENT—ALLEGATION THAT OATH IS "CORRUPTLY" FALSE.

It is not necessary in an indictment under section 5392, Rev. St., to allege that the oath of the defendant was "corruptly" false, but it is sufficient to describe the offense in the language of the statute.

3. SAME—JURAT.

In an indictment for perjury in swearing to an affidavit, it is not necessary that it should appear that the officer before whom the oath was taken wrote a jurat or memorandum of the transaction on the instrument, but it is sufficient, after setting out the affidavit, to allege that the defendant, being duly sworn, did depose and say that the same was true; and the fact may be proved by parol.

4. SAME—ALLEGATION THAT DEFENDANT WAS SWORN.

In an indictment for perjury it must distinctly appear that the defendant was duly sworn.

Indictment for Perjury.

James F. Watson, for plaintiff.

W. D. Fenton, for defendant.



DEADY, J. The defendant is accused by the grand jury of the crime of perjury, alleged to have been committed as follows:

"On December 8, 1883, the defendant having then and there subscribed the following written declaration and affidavit:

"Homestead Affidavit, under Section 2294, Rev. St., for Settlers Who cannot Appear at the District Land-Office.

"OFFICE OF THE CLERK OF THE DISTRICT COURT FOR LINN COUNTY,  
"December 8, 1883.

"I, James A. Hearing, of Sweet Home, Linn county, Oregon, having filed my homestead application No. —, do solemnly swear that I am a native citizen of the United States, over the age of 21 years; that said application No. — is made for the purpose of actual settlement and cultivation; that said entry is made for my exclusive use and benefit, and not directly or indirectly for the use or benefit of any other person or persons whomsoever; that I am now residing on the land I desire to enter, and that I have made a *bona fide* improvement and settlement thereon; that said settlement was commenced December 5, 1883; that my improvements consist only of some slashing done on the place, and that the value of the same is \$5; that owing to the great distance, I am unable to appear at the district land-office to make this affidavit, and that I have never before made a homestead entry except \* \* \* ."

"James A. Hearing did then and there, before C. H. Stewart, clerk of the court for Linn county, Oregon, then and there having full authority to administer said oath, falsely, knowingly and contrary to his said oath, depose and state that the foregoing and hereinafter set forth affidavit was true. That it was not true that the said defendant was then, or any time before said December 8th, residing on the land he desired to enter, and that it was not true that he had made any settlement or improvement thereon, and that it was not true that his improvements consisted of some slashing done on the place, and that it was not true that the value of the same was \$5; that the said defendant, when he took said oath and made said statements, well knew the same to be false, and did not believe the same or any one of them to be true; and that each of said statements was material."

The indictment was found on July 16, 1885, and on November 30th the defendant demurred thereto, for that it did not state facts sufficient to constitute a crime.

On the argument sundry points were made in support of the demurrer which will be noticed hereafter.

The indictment is based on section 5393, Rev. St., which provides: "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished" as therein stated. By section 1 of the act of May 20, 1862, (12 St. 392; section 2289, Rev. St.,) the privilege of entering a quarter section or less of the public land subject to pre-emption was given to any person who is the head of a family, or 21 years of age, and a

citizen of the United States, or has declared his intention to become such. By section 2 of the same, (2290, Rev. St.,) the person applying for the benefit of the act is required to make an affidavit before the register or receiver, showing that he is entitled thereto, and also that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person;" and by section 3 of the act of March 21, 1864, (12 St. 35; section 2294, Rev. St.,) it is provided that "in any case in which the applicant for the benefit of the homestead, and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, is prevented by reason of distance, bodily infirmity, or other good cause from personal attendance at the district land-office, it may be lawful for him to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident."

The affidavit in this case states, not only the qualification of the applicant and his purpose in making the entry, as required by section 2290 of the Revised Statutes, but also the facts and circumstances which authorized it to be made before the clerk, rather than the register or receiver.

The assignments of perjury in the indictment are all made on the defendant's statement in the affidavit concerning these facts and circumstances. Substantially, they are: It is not true that on or before December 8, 1883, the defendant either (1) resided on the land in question; (2) made any improvement or settlement thereon; (3) did any "slashing" on the place; or (4) that said slashing was of the value of \$5. There is no express provision in the statute requiring these matters to be shown by the oath of the applicant, or otherwise, before the affidavit showing his right to make the entry can be received at the land-office.

Counsel for the demurrer contends on this state of the statute that there is no law in the United States which authorized the administration of an oath to the defendant concerning these excusatory facts and circumstances, and therefore the case does not fall within the provisions of section 5393 of the Revised Statutes, defining the crime of perjury. It is not directly contended that the existence of these facts was not material to the right of the defendant to make his proof of qualification and purpose, before the clerk, to make an entry under the homestead act, but only that, however material they may have been in that connection, the statute did not require or authorize the defendant to make an oath to them. The oath of the applicant to the affidavit or the excusatory facts is not compulsory. But whoever wishes to have the benefit of the homestead act must show in some way the existence of the facts which entitle him thereto; and these, when not of record, being within the applicant's knowledge, may be

shown by his own oath. As to the facts showing the qualification of the applicant, and his purpose in making the entry, the statute expressly permits and requires them to be proven by his oath; and if there were no specific direction in the statute on the subject, I think he would be allowed to do so as a matter of course. And this is the condition of the statute in regard to these excusatory facts. The mode of their proof is not prescribed, and convenience, usage, and necessity all point to the oath of the party as the proper evidence of their existence. Certainly it would be within the power of the department to make a regulation on the subject, permitting or prescribing this mode of proof in such a case.

In *U. S. v. Bailey*, 9 Pet. 238, it was held that the act of March 1, 1823, (3 St. 771,) declaring "that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he shall be guilty of perjury," included, in the language of the syllabus, "an affidavit taken before a state magistrate, authorized to administer oaths, in pursuance of a regulation or in conformity with a usage of the treasury department, under which the affidavit would be admissible evidence at the department in support of a claim against the United States, and perjury may be assigned thereon."

So here, the statute not having prescribed the mode of proving the excusatory or preliminary facts, a regulation of the department might direct or permit that it be done by some such recognized mode of proceeding as the oath of the applicant, and thereupon such oath when taken is administered, in effect, under or in pursuance of a law of the United States, and therefore perjury may be assigned thereon. Whether such a regulation exists or not is a matter within the judicial knowledge of the court; that is, it is a matter about which the court may inform itself. My attention has not been called to any specific regulation of the department on the subject, but I am quite certain there is one. The facts must be shown in some way, before the affidavit can be sworn to before the clerk; and as the statute is silent thereabout, in the nature of things, 20 years would not have elapsed without some department regulation or usage on the subject. The affidavit used in this case is evidently a blank form filled up, and, if so, in all probability a department blank; and the reasonable inference from this fact, if it be one, is that there is a regulation of the general land-office to the effect that the affidavit required of an applicant for a homestead entry, when made before a clerk, may contain a statement of the facts which authorize the affidavit to be verified before such officer.

But I think that even in the absence of any statute or department regulation on the subject, the applicant might prove the existence of the facts which authorized him to swear to his affidavit before the clerk by his own oath. As I have said, they must be shown or proven in some way before an affidavit taken by a clerk can be used in the

land-office. The usual way of proving facts like these in such a proceeding is the oath of the applicant; and if they are so proved, I think the oath may be made before the clerk authorized to take the affidavit. As the authority of the clerk to swear the applicant to the affidavit depends on the existence of the facts excusing the latter's attendance at the land-office, it is convenient and proper that they should be made to appear to him before administering the oath to the applicant; and this may be conveniently done by incorporating the applicant's statement concerning them in his affidavit. On the other hand, if the proof of these facts must be made before the register or receiver, the applicant is, in effect, deprived of the privilege of making his affidavit at home, before the clerk, and if he attends at the district land-office at all, he has no use for the excusatory facts, and may make his affidavit there without any reference to them.

On the whole, my conclusion is, the act of 1864 permitting an applicant to make his affidavit for a homestead entry in a certain contingency before a clerk, by a necessary implication, requires such applicant, before he can avail himself of such privilege, to show by oath that such contingency exists; and that the clerk may, as incidental to his power to take the affidavit, administer such oath. The matter is also material, for on the existence of the excusatory facts depends the power of the clerk to administer the oath to the affidavit, and the right of the applicant to take the same before him, and use it in the land-office.

Neither is it necessary to allege in the indictment that the false oath was taken "deliberately and corruptly," or otherwise than as indicated by the language of the statute defining the crime, namely, that the defendant, "willfully and contrary" to his oath to testify truly, did state what he did "not believe to be true." If the defendant willfully stated in his affidavit that which he did not believe to be true, he thereby committed the perjury defined in this statute, and nothing further need be alleged to show it. It is admitted that in charging a common-law perjury it is usual, and probably necessary, to allege that the oath is willfully and corruptly false. 2 Whart. Crim. Law, § 1286; 2 Bish. Crim. Law, § 1046.

But this is a statute offense, and it is sufficient to describe it in the words of the statute. In this case the *corruptness* or evil intent is sufficiently manifest from the terms of the statute. No one can willfully testify in a matter material to that which he does not believe, with other than an evil intent, or, in other words, corruptly. Nor is it necessary that it should appear from the indictment that the clerk made a jurat or memorandum on the affidavit, stating when and where the defendant swore to the same. If the oath was in fact administered by the clerk to the defendant, it is not necessary, for the purpose of this proceeding, that he should have made a memorandum of the fact on the affidavit or elsewhere. The guilt or innocence of the defendant depends on the state of his knowledge when

he took the oath, and not on the subsequent conduct of the officer in making, or omitting to make, a memorandum of the transaction.

But I do not think it is sufficiently alleged in the indictment that the defendant was sworn to the affidavit. The affidavit and the subscription thereto are set out in the indictment, and this should have been followed by an allegation to the effect that the defendant, being then and there duly sworn by the clerk of the court for Linn county, did depose and state that said affidavit was true. The allegation in the indictment that the defendant did depose and state contrary to his *said oath* is, if anything, an attempt to assign perjury on a "said" or supposed oath, the administration of which is nowhere alleged. But the fact that the defendant was sworn must be distinctly stated. It is not sufficient even that it appears by implication. 2 Whart. Crim. Law, § 1287.

It is also objected to the indictment that it does not allege that the defendant was a resident of Linn county at the time of taking the oath, and that the affidavit refers to an application not identified by number or description of the land mentioned therein. But as the demurrer to the indictment must be sustained because it does not appear therefrom that the defendant was sworn to the affidavit, it is not necessary to consider these objections.

If the defendant was sworn to the affidavit set out in the complaint, before the clerk, and the same was false to his knowledge in any one of the particulars alleged, an indictment for perjury may be maintained thereon. I will therefore submit the matter to the next grand jury for their consideration, when these objections may be obviated in the preparation of another indictment.

The demurrer is sustained, and the charge is directed to be submitted to the next grand jury.

---

### *In re* IMPANELING AND INSTRUCTING THE GRAND JURY.

(District Court, D. Oregon. March 28, 1886.)

#### CONSPIRACY AGAINST LAWS OF UNITED STATES—DRIVING CHINESE OUT OF UNITED STATES—REV. ST. § 5336.

A conspiracy or agreement of two or more persons to drive the Chinese out of the United States, or to maltreat or intimidate them, with a view of constraining them to depart therefrom, is *prima facie* a conspiracy to prevent and hinder the execution, operation, or fulfillment of a law of the United States, namely, the treaties with China of 1868 and 1880, and is an indictable offense under Rev. St. § 5336.

DEADY, J., (*charging grand jury.*) An evil spirit is abroad in this land,—not only here, but everywhere. It tramples down the law of the country and fosters riot and anarchy. Now it is riding on the

back of labor, and the foolish Issachar couches down to the burden and becomes its servant. Lawless and irresponsible associations of persons are forming all over the country, claiming the right to impose their opinions upon others, and to dictate for whom they shall work, and whom they shall hire; from whom they shall buy, and to whom they shall sell, and for what price or compensation. In these associations the most audacious and unscrupulous naturally come to the front, and for the time being control their conduct. Freedom, law, and order are so far subverted, and a tyranny is set up in our midst most gross and galling. Nothing like it has afflicted the world since the Middle Ages, when the lawless barons and their brutal followers desolated Europe with their private wars and predatory raids, until the husbandman was driven from his ravaged field, and the artisan from his pillaged shop, and the fair land became a waste.

The dominant motive of the movement is some form of selfishness, and its tendency is backward to barbarism,—the rule of the strongest, guided by no other or better precept than this: "Might makes right." This is not the time or place to inquire into the cause of this condition of society. It may be the natural outcome of the modern political economy, which, assuming that the conflict of private interests will produce economic order and right, has reduced the relation between capital and labor to the mere matter of supply and demand, and limited the duty and obligation of the one to the other to the payment of the minimum of wages for the maximum of labor on the one hand, and the getting the maximum of wages for the minimum of labor on the other. But, whatever the cause, I have faith that the teaching of experience, and the good sense and love of justice of the people, will find a remedy for the evil in time. And in the meanwhile it behooves those of us into whose hands the administration of the law and the conservation of the public peace is confided to do what we can, wisely but firmly, to prevent this evil spirit from destroying the material resources of the country, and making any improvement in the condition of society, in this respect, still more difficult and doubtful.

Lately, this spirit has been manifesting itself in Oregon, by assaulting, robbing, and driving out the helpless Chinese who are engaged among us at lawful labor for an honest living. The excuse given for this conduct is that the Chinese are taking the bread out of the mouths of their assailants by working for less wages and living cheaper than the latter can. In other words, they complain of the industry and economy of the Chinese as being beyond their competition. As we all know, this statement must be taken with much allowance. True, the Chinaman is industrious and economical, and he has the advantage of being temperate and faithful to his engagement. But he demands and gets better wages here than white men in any other part of the world, and, save in the matter of whisky and tobacco, he lives as well and is as well clad as the bulk of common laborers anywhere.

But this outcry against the Chinese as laborers is not new. It was heard from 30 to 50 years ago; when the native mobs in our eastern towns and cities undertook to drive out the comparatively "cheap labor" of Ireland and Germany, particularly the latter, that was then crowding into this country and filling the places of the slothful and shiftless. It is not necessary now to consider the right of a people to oppose or put a stop to an undesirable immigration. For my own part I have no doubt that the United States has the same right to prevent an immigration within its boundaries, of people that it deems objectionable, as it would have to repel an armed invasion by them. But this is a matter for the whole country, represented by the national government, to decide, and not for individuals or neighborhoods, or even states.

The Chinese now in this country are here under the sanction of a solemn treaty with the United States, and any attempt on the part of individuals, acting singly or in numbers, to expel them by any threat, menace, violence, or ill usage is not only wrong but unlawful. Our treaty relations with China extend over a period of more than 40 years. On July 3, 1845, a "treaty of peace, amity, and commerce" was negotiated by Caleb Cushing, on behalf of the United States. Pub. Treat. 116. By it the citizens of this country were granted the right to frequent and reside with their families, and trade, at the five ports of Kwang Chow, Amoy, Fuchow, Ningpo, and Shanghai. On June 18, 1858, William B. Read negotiated another treaty, in which the government of China agreed to defend the citizens of the United States in China "from all injury or insult of any kind." Pub. Treat. 129. To this there was a supplement, on November 8th of the same year. Pub. Treat. 137. On July 28, 1868, a treaty was negotiated by William H. Seward, containing sundry articles in addition to the last one. Pub. Treat. 147. By article 5 of this treaty "the United States and the emperor cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as *permanent residents*. The high contracting parties therefore join in reprobating any other than an entirely voluntary emigration for these purposes." Article 6 provides:

"Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges and immunities and exemptions, in respect to travel or residence, as may be then enjoyed by the citizens or subjects of the most favored nation."

On November 11, 1880, another treaty concerning "immigration" was negotiated. 22 St. 826. Article 1 of this treaty gave the United

States the right to "regulate, limit, or suspend," but not to "absolutely prohibit," the coming to or residence of Chinese laborers in the United States whenever it was thought that their residence here was contrary to "the interests" of the country or endangered "the good order" thereof. Article 2 provided that Chinese, other than laborers and Chinese laborers then in the United States, "shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, and immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Under the concession contained in this treaty congress passed the restriction act of May 6, 1882, (22 St. 58,) suspending the coming of Chinese laborers to this country for the term of 10 years from the expiration of 90 days after the date thereof.

The significance of the stipulation in the foregoing treaties with China, to the effect that the Chinese in this country shall be entitled to all the privileges and immunities that are "accorded to the citizens and subjects of the most favored nation," will be better understood by a reference to our treaty stipulations with Great Britain on that subject. By article 1 of the treaty of "commerce" with that country of July 13, 1815, (Pub. Treat. 293,) renewed and continued in force by article 4 of the treaty of October 20, 1818, (Pub. Treat. 299,) and further indefinitely continued by article 1 of the treaty of August 6, 1827, (Pub. Treat. 312,) it is provided:

"The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid [of the United States, and Great Britain in Europe] to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively."

From this brief statement of the treaties bearing on the subject, you will perceive that any attempt to compel or constrain any Chinese resident of this country to remove from or to any particular place, or to refrain from following any lawful occupation, or doing any lawful work that he may find to do, is not only morally wrong, but contrary to the law of the land. It is commonly known that during the past few weeks gangs of masked men have, in the night-time, entered the houses and camps of peaceful Chinese residents, engaged in useful labor at various points in this vicinity, and, by serious intimidation and threats of personal violence, have compelled them to leave their homes and work, and come to Portland. There is no doubt but that this brutal and inhuman conduct is a gross violation of the rights guarantied to these people by the national government through the treaties aforesaid. Nor is there any doubt of the power of congress to provide for the punishment of any person who injures, annoys, or disturbs any subject of a foreign government, resident in any part of the United States, contrary to the treaty stipulations with such government.



The powers of the national government, though limited in number and subject, are supreme in their sphere. A treaty with a foreign power is the supreme law of the land; and congress may provide a punishment for its infraction or the deprivation of or injury to a right secured by it, as in the case of an ordinary law. Without this power, the national government would be unable to keep faith with other nations. In all our external relations the individual states are unknown. The government of the Union or United States stands for all, and in this respect may enforce obedience to its authority by the prosecution and punishment of individuals who act contrary thereto.

The next question is, has congress passed any law for the punishment of persons who, contrary to the treaty stipulations, molest the subjects of foreign powers resident in this country? So far as my judgment goes, the matter is not free from doubt. I am quite clear that congress has not passed any act having this object solely and directly in view. The reason for the omission may be that heretofore it was not thought necessary, as each state could and would, in the ordinary course of justice, furnish protection to all persons living within its borders. But this illusion has been dispelled, and experience has demonstrated that unless the general government furnishes the Chinese on this coast with protection, their treaty rights may be violated with impunity. Section 5519 of the Revised Statutes is broad enough in its terms to cover the case. This is section 2 of the act of April 20, 1871, (17 St. 13,) passed to enforce the fourteenth amendment, and provides for the punishment of persons who "conspire or go in disguise upon the highway, or on the premises of another, for the purpose of depriving" any one of "the equal protection of the laws," etc.

But in *U. S. v. Harris*, 106 U. S. 629, S. C. 1 Sup. Ct. Rep. 601, the supreme court held that this section, as regarded the inhabitants of a state simply, was unconstitutional; that the prohibition of the amendment, as to "the equal protection of the law," was directed against the state, and not individuals, and therefore congress could not, by way of enforcing such amendment, provide for the punishment of individuals who commit such acts. Notwithstanding this decision, it has been suggested that, although this section is unconstitutional as an act to enforce the fourteenth amendment, it is valid as an act to enforce treaty stipulations guarantying a foreigner, living in any state, the protection of the laws therein. The suggestion is a plausible one, to say the least of it, but I do not feel confidence enough in it to adopt it.

Section 5336 of the Revised Statutes, which is also carved out of section 2 of the act of April 20, 1871, (17 St. 13,) to enforce the fourteenth amendment "and for other purposes," provides that—

"If two or more persons, in any state or territory, conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to

v.26f.no.10—48

*prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States, contrary to the authority thereof,—each of them shall be punished by a fine of not less than \$500 and not more than \$5,000, or by imprisonment with or without hard labor for a period of not less than six months nor more than six years, or by both such fine and imprisonment."*

This section has nothing to do with the fourteenth amendment, and there is no doubt of its constitutionality. It was copied into the act of 1871, aforesaid, from the act of July 31, 1861, (12 St. 284,) "to define and punish certain conspiracies" against the United States of a seditious or treasonable character. And the only question now is, does it include the acts or conduct under consideration?

Speaking only for this occasion, and reserving my final judgment until I may hear the matter fully argued, I think it does. The attempt to drive the Chinese out of the country, or to maltreat or intimidate them with a view of constraining them to depart, is *prima facie* an attempt to prevent and hinder the execution, operation, or fulfillment of a law of the United States, namely, the treaties with China of 1868 and 1880; and a conspiracy or agreement of two or more persons to engage in such conduct may, for that reason, be well characterized as a seditious and treasonable conspiracy against the authority and laws of the United States.

A mere assault, or even robbery, committed on a Chinaman, without any ulterior purpose other than a desire to vex and annoy or to steal, may not be a violation of this section. *Prima facie* such conduct is not intended to prevent the execution or operation of the law of the United States giving the Chinese the right to reside here indefinitely. But when, as I have said, the purpose of the conduct is to expel the Chinese from the country, either by direct deportation or such intimidation or violence as is likely to constrain them to go, I instruct you that the case comes within that clause in the section which makes it a crime "by force to prevent, hinder, or delay the execution of any law of the United States."

Some cases will be submitted to you by the district attorney of persons charged with mobbing and driving out Chinese in this vicinity who have been held to answer therefor before you. Take these cases and examine them carefully, and, if you find that any of the parties have maltreated, menaced, or intimidated the Chinese for the purpose or with the intent to compel or constrain them to leave the country or to remove from any place therein, it will be your duty to present them to the court for trial.

Trusting that you will do your duty in the premises, and that you will, according to the obligation of your oaths and your duty as citizens, present things truly as they come to your knowledge, without fear, favor, or affection, I commit the matter to your hands.

DEDERICK v. WHITMAN AGRICULTURAL CO.<sup>1</sup>

(Circuit Court, E. D. Missouri. March 15, 1886.)

1. PATENTS FOR INVENTIONS—BALING-PRESSES—LETTERS PATENT No. 170,998.  
The first claim of letters patent No. 170,998 is void for want of invention.
2. SAME—LETTERS PATENT No. 224,281.  
The first claim of letters patent No. 224,281 is, in view of the previous state of the art, void, unless restricted to the peculiar devices named in the combination therein described.
3. SAME—INVENTION.  
The mere change of position of an old mechanical device from one part of a machine to another to effect the same result involves no patentable invention.

In Equity.

Suit for the infringement of the first claim of letters patent No. 170,998 and the first claim of letters patent No. 224,281, both for improvements in baling-presses.

Said claims are respectively as follows:

"(1) In a press having the bale-chamber smaller than the press-box, beveling the mouth of the bale-chamber, substantially as described."

"(1) The combination of a press-box, a bale-chamber, and a reciprocating traverser, and means for increasing or diminishing at will the area of the passage between the press-box and the bale-chamber, whereby to render the sections or charges of material larger or smaller and produce bales of greater or less density, substantially as described."

*L. Hill and Fisher & Rowell*, for complainant.

*William H. King and Dyer, Lee & Ellis*, for defendant.

TREAT, J. This suit is brought for the alleged infringements of the first claim of letters patent No. 170,998, issued to complainant December 14, 1875, and the first claim of letters patent No. 224,281, issued to complainant February 10, 1880. The non-compliance with equity pleading and the rules of court has imposed a large amount of useless labor upon the court in order to ascertain the actual points in controversy. Counsel for parties should be able to present exactly the points of difference upon which judgment of the court is required. After wading through for many days a useless mass of irrelevant matter the court has ascertained the actual points in controversy, involving a waste of time on its part which would have been avoided if the rules of practice had been properly observed. Substantially, the rights of the parties are to be determined by the following considerations.

1. Was there in the first claim of patent No. 170,998 any invention patentable? The forcing of elastic material from a larger into a smaller box by whatever motive force exercised could necessarily be facilitated by the most common mechanical contrivance, viz., bevel-

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

ing the passage therefor. There was nothing novel or calling for inventive faculty in beveling the passage. So, irrespective of any question as to anticipatory patents, the court holds that as to said first claim of patent No. 170,998 said claim is void for want of patentable invention. Were it otherwise, such contrivance was long before anticipated.

2. As to the first claim of patent No. 224,281, that claim is for a combination therein described; the description whereof is vague and indefinite. The purpose sought to be effected was the contraction in an adjustable way of the passage from the press-box to the bale-chamber without specifying the mechanical devices whereby such a result could be effected, unless the combination is limited to the exact modes of effecting such a result. If such limitation is not to be considered an essential part of the combination then the claim is too broad, for prior thereto modes of such flexible adjustment were well known at the discharge of the rear end of the bale-chamber and by other modes of contracting the sides of the bale-chamber. Hence, the mere change of position of known mechanical devices from one part of the bale-chamber to another to effect the same result involves no patentable invention. Were it otherwise the court would hold that said devices had been anticipated by other patents produced in evidence.

The conclusion therefore is that the first claim of patent No. 170,998, is void. As to the first claim of patent No. 224,281, unless the same is restricted to the peculiar devices named in said combination the same is void. But the defendant does not use the specific mode of effecting the result named in said patent, and consequently does not infringe.

Bill dismissed with costs.

---

**BABCOCK, Deceased, by another, Special Adm'r, v. NORTHERN PAC.  
R. Co.<sup>1</sup>**

*(Circuit Court, D. Minnesota. March, 1886.)*

**1. CONTRACT FOR USE OF INVENTION CONSTRUED.**

An agreement to pay \$30 for each of the first 400 locomotive engines to which an invention should be applied, is not an agreement to apply the invention to 400 locomotives, and to pay \$30 for each one.

**2. SAME.**

The terms of payment, under this contract, were \$6,000 within 30 days after the contract was executed, and the remainder within the period of one year. *Held*, that this was an agreement to pay \$6,000 absolutely within 30 days, and in case the invention was applied to a number of locomotives sufficient to produce, at \$30 for each, a greater sum than \$6,000, then this excess was the remainder contemplated, and was payable within the year.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar

In Equity.

Rockwood & Collom, for plaintiff.

W. P. Clough, for defendant.

NELSON, J. The contract upon which plaintiff's suit is founded requires the payment of \$30 for each of the first 400 locomotive engines to which the invention owned by plaintiff shall be applied by defendant. The terms of payment are \$6,000 within 30 days after the contract is executed, and the remainder within the period of one year thereafter.

The defendant did not agree to apply the invention to 400 locomotives, and pay \$30 for each one; but it agreed to pay \$6,000 absolutely within 30 days, and in case the number of locomotives to which it shall be applied within one year after execution of the contract at \$30 for each would produce a sum more than \$6,000, the remainder, that is, the excess over \$6,000, it agreed to pay within one year. After payment shall have been made upon 400 locomotives, no further sum should be paid by the defendant for the use of the invention. The defendant was not compelled to use the invention upon all of the 400 locomotives, or upon any; but it is bound to pay \$6,000 within 30 days after the contract was executed, which it has done, and it is admitted that the invention is not used upon more than 200 locomotives.

Judgment will be entered in favor of the defendant.

---

### LIBBEY v. MT. WASHINGTON GLASS Co. and others.<sup>1</sup>

(Circuit Court, D. Massachusetts. February 17, 1886.)

#### 1. PATENTS FOR INVENTIONS—PARTY-COLORED GLASSWARE.

On motion for preliminary injunction, letters patent No. 232,002, granted to Joseph Locke, July 24, 1883, for an improved article of glassware, and the process for making the same, sustained.

#### 2. SAME—NOVELTY.

This patent was for an article of glassware of ruby and amber colors, made from a gold-ruby compound, which was a well-known glass mixture containing gold. Patentee discovered that, by reheating only a portion of the article, the ruby color was developed in the reheated portions, while the other portions remained amber colored, producing an article known as "amberina." This process of obtaining party-colored glassware had been before practiced, but not with gold-ruby compound,—the amber color had not been obtained,—except by accident, and then with no thought of utilizing the product,—and, although this fact undoubtedly led patentee to make the discovery, the patent was sustained.

#### 3. SAME—DESCRIPTION OF INVENTION.

The specification of this patent sufficiently describes the invention to enable persons skilled in the art to which it relates to produce the patented article.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

**1. SAME—DISCLAIMER PENDING SUIT.**

A disclaimer can be made after the suit is commenced; and the defendants in this case having knowledge of the scope of the patent, and sufficient time to prepare their defense to a motion for an injunction, *held*, that their rights had not been prejudiced in any degree by the disclaimer.

In Equity.

*Livermore & Fish*, for complainant.

*J. E. Maynadier*, for defendants.

COLT, J. This motion for a preliminary injunction is based upon the alleged infringement of letters patent No. 282,002, granted to Joseph Locke, July 24, 1883, for an improved article of glassware, and the process for making the same. The article of glassware described by Locke is of ruby and amber colors. It is made from what has long been known as the "gold-ruby compound," which is a glass mixture containing gold. By the old process for working gold-ruby, the compound was taken from the pot, and worked into the desired shape, it being then of an amber color. It was then reheated uniformly throughout, when it developed into a ruby color. Locke discovered that by reheating only a portion of the article, he could make it of two colors; the ruby color being developed in the parts so reheated, while the other portions of the article retain an amber color. The result is a new article of glassware, partly of amber, and partly of developed ruby, the two colors shading into each other and producing a beautiful and artistic effect. The article is known in the trade as "amberina," and it has had great success in the market from the beginning.

Upon the evidence before us, the only other articles of glassware, prior to the discovery of Locke, composed of homogeneous stock and of variegated color, due to the subjection of parts of the article to reheating, were two in number. One compound has an opal shade, due to the mixture of bone with the glass, and is called opalite. The other article is pink and white, but what the coloring agent is does not appear. To a limited extent, therefore, the process of obtaining party-colored glassware by reheating portions of the article had been practiced before Locke. But no one before Locke discovered that the gold-ruby compound could be so treated, and that it would produce an article so attractive in appearance. In the old process of making ruby-colored glass, it was sometimes found that a portion of the article, which had escaped in some degree the reheating process, retained the amber color. Undoubtedly this fact led Locke to his discovery; but, prior to Locke, any amber color in the ruby glass was considered accidental, and the article imperfect, and only fit to be broken up and remelted.

The defendants contend that the specification of the patent does not sufficiently describe the mixture which is used, but we take a different view. Gold-ruby was a well-known glass compound at the date of

the patent, and persons skilled in the art would understand what was meant, and could produce the patented article from the description given. The specification describes how to make party-colored glass from the gold-ruby compound, or "amber glass mixture." It then goes on to state that the patentee does not confine himself to an amber glass mixture containing gold, but includes other metals and substances employed to give color to glass compounds when subjected to heat, as described. The claims of the patent are as broad as the specification, and are not limited to any particular compound. Since bringing suit, the plaintiff has filed a disclaimer under the statute, in which he limits his claim to the gold-ruby compound. This the plaintiff had a right to do. Under the authorities cited by the plaintiff, this was a patent where a part could be properly disclaimed. It did not require the importation of anything new into the specification, but simply the elimination of a part of what was originally claimed. A disclaimer can be made after suit is commenced.

The argument of defendants that they have to meet a different case since the disclaimer, and that, therefore, a supplemental bill should be first filed, and then another motion for a preliminary injunction, does not seem to have much force in this case. The defendants have long been apprised of the real nature of this controversy, and that Locke's claim was confined to variegated glassware made from gold-ruby. This was the main issue in the interference proceedings in the patent-office between Locke and the defendant Shirley, where the examiners in chief, in a well-considered opinion, decided in favor of Locke as the prior inventor. The disclaimer has been filed since August 29th, and the defendants, so far as appears, have had sufficient time since then to prepare their defense to this motion. We do not see how their rights have been prejudiced in any degree by the disclaimer.

Motion for preliminary injunction granted.

---

### BUCKINGHAM v. PORTER and others.

(Circuit Court, D. California. September 1, 1884.)

#### 1. PATENTS FOR INVENTIONS—INFRINGEMENT—BOOTS—PATENT No. 204,068.

A patent for a boot, consisting of an inside counter-protector at the back of the boot, with the sides extending over the cross-seams at the sides of the boot, fastened by a row of stitching beyond the eye-seams, by which they are covered and protected, is not infringed by a boot having an outside counter-protector extending into and fastened by seams lapped at the side of the boot and extending no further and not fastened by stitching outside of the lapped seams.

#### 2. SAME—NOVELTY—BOOTS—PATENT No. 214,684.

Patent No. 214,684, in so far as it claims an outside counter-protector with lateral ends extending to the side seams of the boots inserted in the side

seams formed by doubling down the back and front leathers of the boot, with or without welts, and stitching all together to form the seams, is void for want of novelty.

In Equity.

M. A. Wheaton, for plaintiff.

John L. Boone, for defendants.

SAWYER, J. This is a suit upon two patents for improvements in the manufacture of boots. The first patent is number 204,068, dated May 21, 1878. It provides for a counter and counter-protector at the heel of the boot on the inside at the back of the boot. "To the inside of the back, B, is secured one end of a protector, E, which extends from a point about half way up the boot-leg, where it is stitched to the back, down to the bottom of the stiffening, or counter, D, and is turned under the heel with the counter. The sides, F, of the protector, E, extend to points in front of the eye-seams, C, as shown in figures 2 and 3 in drawing, and are there secured by single rows of stitching, G." The claim of the patent is: "A counter-protector, *as hereinbefore described*, extending from a point in front of one eye-seam over the seams to a point in front of the opposite eye-seam, *substantially as described*." The boot claimed to be an infringement of this claim has a counter-protector on the outside, and not on the inside of the boot. It is extended to the edge of a lapped seam, but does not extend around beyond the seam. The party alleging an infringement insists that being on the outside does not make any difference; that it is a mere change of the location. That would be so, if the specification and claim did not make the location a part or element of the invention and an element in the claim which is specifically done here. It is stated to be on the inside, and passes from one eye-seam around beyond the other eye-seam, and then stitched outside the eye-seam beyond, so as to cover, protect, and strengthen the eye-seam, and make a smooth seam there; one that will not chafe the leg. It is particularly described as being on the inside. Besides, there were several other boots with outside counter-protectors extended and fastened by a line of stitching beyond the seams introduced in evidence. They were introduced both for the purpose of showing an anticipation and also the state of the art. Supposing that they were inadmissible, as showing anticipation, as claimed by complainant, for want of notice, they were still admissible, as showing the state of the art.

The uncontradicted testimony shows that this mode of construction with outside protectors had been in use for years; the outside protector passing over beyond the eye-seam, and being stitched on the opposite side of the seam. This being so, the claim of complainant's patent must be construed, not only with reference to the specific language of the specification and claim, but also with reference to



the state of the art. If I should construe this specification and claim as including an outside counter-protector, the improvement claimed would, unquestionably, be anticipated by those boots. But we must suppose that the patentee did not intend to include in his claim an element which would destroy the novelty, and confine his claim to an inside protector, as he states it to be in his specifications. The express language of the specification is "inside." I, therefore, think, in view of the language, and state of the art, that the counter-protector on the outside is not to be deemed an equivalent for the one on the inside.

Besides in the boot that is claimed to be an infringement, in addition to its not having the counter-protector on the inside, the counter-protector does not extend beyond the eye-seam, C, and it is not fastened by a line of stitching beyond the eye-seam. It only extends into the seam, and is there stitched as a part of the lapped seam. This extension and fastening by a line of stitching beyond the eye-seam is one of the elements of this claim. It is not such a boot in this particular as is here described in the specifications and claim; and in that respect, also, it fails to have one of the elements that make up the claim in this patent. It is clearly not an infringement of the patent, and the complainant cannot recover on that ground.

The same boot is claimed to infringe another patent in suit which the complainant owns, No. 214,684. This patent was issued to one of the same parties to whom the preceding patent was granted; and this patent claims an outside counter-protector. Evidently the patentee did not understand that an outside counter-protector was covered by his prior patent for an inside counter-protector. He describes his invention in this way: "E is the counter-protector extending vertically on the outside of the counter to a point considerably above the same, where it is secured by a row of stitches, A. The lateral ends of the counter-protector pass to the interior of the boot, through the eye or side seams." Instead of passing over the eye or side seams and being stitched on the other side, it passes through the eye-seam to the interior of the boot, and then passes beyond and is stitched to the inside. The ends "pass to the interior of the boot through the eye or side seams, and are fastened either by the stitches which form a part of the side seams alone or by the said stitches and one or more additional rows of stitches." The patentee has so framed his specifications and claim, as to cover both cases; either the end of the protector combined with the side seam and stitched in with it and ending with the seam alone, or as stitched in with it, and then passing on beyond and fastened by other lines of stitching beyond the side seam, similar to that in the preceding patent. He has given us a great many drawings in his specifications—eleven different drawings—intending to cover, doubtless, every possible form of fastening the counter-protector in the seam, and beyond the seam. The only one of them which the

boot in evidence can possibly be regarded as infringing is No. 11. The protector in this boot does not pass through and beyond the seam as in No. 8, but is stitched in with the eye-seam or side seams, and ends with the seam of which it forms a part; whereas, in No. 8, the protector, after being stitched in the seam, passes beyond and is stitched again inside beyond the seam, as in the preceding patent. There is nothing of that kind in the boot claimed to be an infringement. In fact, the boot has not got an eye-seam at all in that part covered by the counter. It is a lapped seam, but if it were an eye-seam it would doubtless be covered by drawing No. 11 in this patent, and that is the only one that could cover it. It is not an eye-seam, but a lapped seam. Considering the point, then, in the most favorable light for complainant, the lapped seam would be the equivalent of the eye-seam; and so construing it and holding it to be the equivalent of the eye-seam, as the counter-protector passes around and into the seam and is stitched with it and ends with the eye-seam, I say, considering that lapped seam as the equivalent of the eye-seam, it would probably be covered by this branch of the claim found in drawing No. 11. But, unfortunately for the complainants, the complainant, Buckingham, himself testifies that he saw long before any of these patents were issued boots that were made in the same way. He was asked directly by counsel for the defendant, on cross-examination, if he had not seen that kind of boot, and he said he had; he had seen them where the back and front leathers of the boot were folded down and a welt put in between them and stitched through. He said he had seen them. He was then asked if he had not seen boots having this outside counter-protector, with the front and back leathers doubled down, a similar welt put in, and also the ends of the counter-protector inserted with the welt, and all stitched through with the back and front leathers; the welt and the ends of the counter-protector stitched together in the side seam; and he said he had seen them repeatedly, long before these patents. That is exactly what this part of the claim represented by drawing No. 11 is, and so it is in the infringing boot. The protector is stitched into the lapped seam between the front and back leathers, and does not extend beyond the seam. It ends right there with the seam. The back and front of the boot are lapped over and a welt put in or omitted, as the case may be, and the ends of the counter-protector inserted with or without the welt between the front and back leathers, and stitched right through the two sides of the boot, the welt and the counter-protector; and the protector ends with the seam as in diagram No. 11. It is, therefore, precisely the same thing as this in drawing No. 11, conceding the lapped seam to be an equivalent for the eye-seam. If not an equivalent, then certainly there is no infringement. As to that part of the claim, therefore, the patent is void for want of novelty, and the uncontradicted testimony of the plaintiff himself proves the fact. So that, conceding this boot to be an infringement of this part

of the claim, the patent as to that part is void for want of novelty. There must, therefore, be a decree dismissing the bill as to both patents, and it is so ordered.

# DERICK v. WHITMAN AGRICULTURAL CO.<sup>1</sup>

(Circuit Court, E. D. Missouri. March 15, 1886.)

1. PATENTS FOR INVENTIONS—PROOF OF ASSIGNMENT OF PATENT—CERTIFIED COPY.  
A certified copy of a recorded but unacknowledged instrument purporting to be the assignment of a patent is admissible in evidence to prove the execution of such assignment, and is sufficient proof thereof in the absence of countervailing testimony.
2. SAME—BALING-PRESS—COMBINATION.  
The first claim of letters patent No. 126,394 is for the combination therein named involving as essential thereto the peculiar construction of the press-box, and is not infringed by a combination into which such press-box does not enter.
3. SAME.  
First claim of letters patent No. 199,052 is valid.
4. SAME—COMBINATION PATENT—EQUIVALENTS.  
A substitution of an equivalent for an ingredient of a combination covered by a patent cannot avert a charge of infringement.

In Equity. Suit for infringement of the first claim of letters patent No. 126,394 for an improvement in baling-presses, and the first claim of letters patent No. 199,052 for an improvement in portable hay and cotton presses.

The complainant sues as assignee. The only evidence offered of the execution of an assignment to him is a certified copy of an unacknowledged instrument on record in the patent office, which purports to be a duly executed assignment. The admission of the copy was objected to by the defendant. The first claim of letters patent No. 126,394 is as follows:

"(1) The combination of the lever or sweep, H, with the lever, G, follower, F, and box, A, of a baling-press, when constructed to operate, substantially as herein described."

The first claim of letters patent No. 199,052 is as follows:

"(1) In a portable press the combination of a horizontal guide-frame with a reciprocating follower pitman, and pivoted double cam at the end of tongue or sweep-lever of press, substantially as and for the purpose set forth."

*L. Hill and Fisher & Rowell*, for complainant.

*William H. King and Dyer, Lee & Ellis*, for defendant.

TREAT, J. This suit is brought upon the first claims respectively of letters patent No. 126,394 and letters patent No. 199,052, for alleged infringements thereof by the defendant. Objection has been

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

interposed by the defendant as to the proofs of assignments of said patents to the complainant. The court holds that the proofs of said assignments respectively are complete in the absence of countervailing testimony.

As to the first claim of patent No. 126,394, the court decides that the same is for the combination therein named, involving as essential thereto the peculiar construction of the press-box. There is nothing in said combination justifying the contention of counsel that it covers every use of a toggle-joint which passes the center line. It must be observed that the claim is for a combination of certain elements of which the press-box of a peculiar construction was a prominent feature. An examination of the patent does not show with any distinctness that any new or old device for such a toggle-joint passing the center line entered into the combination as a distinctive element or any part thereof.

So far as the first claim of patent No. 199,052 is involved the essential inquiry pertains to the use of the double cam in the combination stated, whereby the result sought could be more usefully and effectively produced. That combination was of several elements, possibly all of them were old, but by their juxtaposition and arrangement effecting a new and useful result. The double cam was an important feature in said combination, and defendant's substitute therefor of an equivalent mechanical device does not exempt it from the penalties of infringement. When a combination is patented, whereby an important result is produced, the mere introduction of an equivalent mechanical device by way of substitution for one of the elements of the combination cannot avoid the effect of said patent, or enable the person who resorts to said mechanical equivalent to escape the penalties of infringement.

Hence, as to said first claim of patent No. 126,394 there is no infringement by the defendant. As to the first claim of patent No. 199,052 it is held to be valid, and that the defendant infringes the same.

Under these rulings this cause is referred to the master to ascertain the damages sustained by the complainant, for the infringement of said first claim of patent No. 199,052.

STEAM-GAUGE & LANTERN Co. and others v. McROBERTS and others.<sup>1</sup>*(Circuit Court, N. D. Illinois. January 25, 1886.)*

## 1. PATENTS FOR INVENTIONS—PLEADINGS.

Exceptions for impertinence and immateriality were filed to that part of a bill which described prior patents to the same inventor, and involving the the same principle as one of the patents in suit. *Held*, that it was entirely proper, and under the circumstances of the case almost necessary, to show the relation which the patent in suit bore to the prior patents.

## 2. SAME.

The history of the invention is a part of the controversy in a patent case. The state of the art, and the steps which have been taken, either by the inventor of the patent in question or by other inventors, are a necessary part of the testimony, and proper matters of averment in the bill.

## 3. SAME—RECITAL OF PRIOR LITIGATION.

It is proper to recite in a bill for infringement of a patent prior litigation over the same patent.

## 4. SAME—COMITY—RULE OF, IN SEVENTH CIRCUIT.

In the Seventh circuit, by a rule of comity, the courts, in patent cases, endeavor to observe and follow the decisions which have been made in reference to the same patents, and even upon kindred questions, in other circuits.

## In Equity.

*John G. Chandler and Paul Bakewell*, for defendants.

*Coburn & Thacher*, for complainants.

BLODGETT, J. Nine exceptions are filed to the bill by the St. Louis Railway Supplies Manufacturing Company, one of the defendants in this case. The first, second, third, fourth, and tenth are applicable to so much of the bill as sets out the successive steps of John H. Irwin, the inventor of what is known as the "Tubular Lantern," or a lantern for burning kerosene by supplying an irreversible current of air to the burner. By those five exceptions the defendants insist that all matter pertaining to the history of the Irwin inventions is immaterial and impertinent for the purposes of this case. The suit involves one of the patents of Irwin, and the pleader, in stating the case in the bill, describes quite a number of patents which were issued from time to time to Irwin for lamps and lanterns involving the principle of the patent in question. It seems to me that the history of the invention is not only entirely proper under the circumstances of this case, but that it is almost a necessary part of the complainants' bill, to show the relation which the patent in question bears to other patents which Irwin had obtained upon kindred devices. I do not, therefore, think that those objections are well taken. The history of an invention is always a part of the controversy in the case. The state of the art, the steps which have been taken, either by the inventor of the patent in question or by other inventors, is always a necessary part of the testimony in the case, and it seems to me a proper matter of averment in this bill.

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

The remainder of the exceptions refer to the allegations in the bill as to the litigation which has been had over this patent, some suits having been commenced in regard to other patents involving the principle of the irreversible current, and other cases having been upon the patent directly in question. It seems to me very proper for the complainant to set out this feature of his case, because in this circuit we are, by a rule of comity, endeavoring to observe and follow the decisions which have been made in reference to the same patent, or even upon kindred questions, in other circuits.

None of the objections are well taken, and all of them are overruled.

### THE GARDEN CITY.<sup>1</sup>

#### *In re* Petition of EAST RIVER FERRY CO.

(District Court, S. D. New York. February 17, 1886.)

**1. SHIPPING—LIMITATION OF LIABILITY—VALID UNDER POWER OF CONGRESS OVER ADMIRALTY AND MARITIME CAUSES—CONSTITUTIONAL LAW.**

The act of March 3, 1851, (sections 4282-4289,) in limitation of liability, so far as applicable to marine torts or to other subjects of maritime jurisdiction, is within the constitutional power of congress, independent of its relation to foreign or interstate commerce. Such power is co-extensive with the grant of the judicial power "to all cases of admiralty and maritime jurisdiction," and of all necessary legislative power in regulating the remedies under that jurisdiction; following *The Seawanhaka*, 5 Fed. Rep. 599.

**2. SAME—SECTION 4282, REV. ST.—"MERCHANDISE"—HORSES AND TRUCKS.**

Horses and trucks, which are taken aboard a ferry-boat by their drivers, who are passengers, and remain in their charge upon the trip, are not "merchandise," within the meaning of section 4282, Rev. St.

**3. SAME—SECTION 4283—JURISDICTION—PRACTICE—AMOUNT OF CLAIMS.**

In proceedings to limit ship-owners' liability, under section 4283, it is not necessary to aver in the petition, or to prove, that the claims against the vessel are in excess of her value, as a condition of the jurisdiction of this court to entertain the proceeding.

**4. SAME—SECTION 4289—EXCEPTION—"RIVERS"—"INLAND NAVIGATION"—EAST RIVER—COAST WATERS.**

Section 4289, Rev. St., provides that the act limiting ship-owners' liability shall not apply to vessels "used in rivers or inland navigation." *Held*, that the "East River," so called, is not a "river," but a mere gut or strait, and belongs to the "coast waters" of the country, as distinguished from "inland navigation;" and that navigation on the East river is therefore not included in the above exception.

**5. FERRY-BOATS—PRECAUTIONS AGAINST FIRE—POWERS OF STEAM-BOAT INSPECTORS.**

Under sections 4426 and 4470, Rev. St., the steam-boat inspectors may require ferry-boats to be provided with the same precautions against fire, so far as applicable, that are expressly provided in reference to any other steam vessels carrying passengers; and when the boat passes inspection on the basis of having a steam-pump provided in accordance with section 4471, the boat is bound to maintain it in the condition required by that section. Various sections of the Revised Statutes in regard to steam vessels considered in their application to ferry-boats.

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

6. SAME—STATEMENT OF CASE—SECTION 4471, REV. ST.—INSUFFICIENT HOSE.

Fire broke out in the "center-house" of the ferry-boat Garden City while on one of her regular trips between Roosevelt street and Hunter's point, in the East river. The hose belonging to the boat's fire-pump was coiled and kinked, and without a nozzle attached, and before the fire was extinguished several horses and trucks on the ferry-boat were destroyed. The evidence indicated that the fire might have been checked at once if the hose had been stretched out with the nozzle on. Section 4471 provides that "every steamer permitted by her certificate to carry as many as 50 passengers, or upwards, shall be provided with a steam fire-pump, \* \* \* having at least two pipes, \* \* \* to which pipes there shall be attached good and suitable hose, properly provided with nozzles, and kept in good order and ready for immediate service." *Held*, that the above provisions had been adopted, and made legally applicable to the Garden City by act of the parties, and under the powers conferred upon inspectors by sections 4426, 4470, Rev. St., and that it was not a compliance, either with the statute, or with the demands of reasonable prudence and care for the safety of the lives of passengers in the daily exigencies of ferry-boats on the East river, not to keep the hose stretched out and free from coils and kinks, with the nozzle on, near the overheated parts of the boat like the center-house, where fire is most likely to occur, so as to be literally "ready for immediate service," and that the Garden City was chargeable with negligence in this respect, for which the ferry-boat was liable.

On the thirteenth of December, 1883, while the ferry-boat Garden City was on one of her regular trips from Roosevelt street, New York, to Hunter's point, a trip three and one-half miles in length, a fire was discovered in the "center-house," near the smoke stack, when about opposite Market street. The boat was stopped as soon as possible, her engines were reversed, and in a few minutes she regained the end of her slip at Roosevelt street. The wind was strong from S. S. W., and the fire spread with such rapidity that several horses and trucks, with their harness and equipments, were destroyed. There were but few passengers on the boat, and none were seriously injured. Shortly afterwards two of the owners of the horses and trucks commenced suit in the supreme court of the state to recover their damages, one for \$3,400, and one for \$525, on the ground of negligence on the part of the Garden City. The Garden City was run principally as a ferry-boat. But at Hunter's point she made connections with the Long Island railroad system, and in the transport of passengers, baggage, and express matter, in connection with those roads to and through New York, she was, to some extent, a link in a continuous line of interstate commerce. A petition to limit liability was afterwards filed in this court, pursuant to the act of March 3, 1851, (sections 4282-4289, Rev. St.,) in which the Garden City was valued at \$30,000, and a bond for that sum was executed by the petitioners. Notice for the presentment of claims was duly published. Although some other damages were inflicted, only the two claims above mentioned were presented and proved; and the case has been brought to trial upon the averments of the petition denying any negligence or liability on the part of the petitioners, and also upon the exceptions and answer on the part of the claimants above named. The claimants deny the petitioner's allegations of want of negligence; and, in addition, they contend that the court has

no jurisdiction of the proceeding, because the petition does not allege that the losses were in excess of the value of the boat, and also because, under the last section of the act of March 3, 1851, (sections 4282-4289, Rev. St.) the ferry-boat in question being used solely upon the East river and, as alleged, in "inland navigation," she is excluded from the operation of the act.

*Shipman, Barlow, Larocque & Choate*, for petitioner.

*Charles N. Judson*, opposed.

BROWN, J. Without attempting to discuss minutely the several interesting and important questions presented by this case, I shall indicate, as briefly as possible, the reasons for the conclusions to which, after much consideration, I have come.

1. Although the Garden City, through her connections with the Long Island Railroad Company, had some relations in her navigation to interstate commerce, these relations were slight and comparatively unimportant. In the recent *Case of Vessel Owners' Towing Co.*, 26 Fed. Rep. 169, 170, it was assumed that the power of congress over the subject of limitation of liability "is to be found only in the provisions of section 8, art. 1, of the constitution, which authorizes it to regulate commerce with foreign nations and among the several states; and if the vessel is not one employed in the business of interstate or foreign commerce, then she is not within the terms of the act of congress, and her owners cannot claim the benefit of this provision."

The language above quoted was doubtless used by the learned judge in reference to the special facts of that case, which did not constitute a marine tort. Thus limited, it is no doubt correct; but as a general proposition, applicable to *all* the cases covered by the act of March 3, 1851, the above quoted concession to those objecting to the proceedings is, I think, too broad, and without due consideration of the importance of the question, or of the express reservation of any opinion on that point by the supreme court in the case of *Lord v. Steam-ship Co.*, 102 U. S. 541, 545. The question was carefully considered by my learned predecessor in the case of *The Seawanhaka*, (*In re Long Island Transp. Co.*), 5 Fed. Rep. 599, 608, 618. It was there held that the power of congress to legislate upon a limitation of the liability of vessels and their owners for marine torts was within those clauses of the constitution which extend the judicial power "to all cases of admiralty and maritime jurisdiction," and which authorize congress "to make all laws necessary and proper for carrying into execution the power vested in the government of the United States, or in any department or officer thereof." See *Providence, etc., Co. v. Hill Manuf'g Co.*, 109 U. S. 589; S. C. 3 Sup. Ct. Rep. 379, 617.

There can be no question that the act in limitation of liability, in so far as it respects a liability for marine torts, is legislation upon subjects within the admiralty and maritime jurisdiction. The ad-



miralty jurisdiction over marine torts is wholly independent of interstate commerce. As the subject-matter itself, as one of admiralty and maritime jurisdiction, is thus brought by the constitution within the federal judicial power, and as the judicial power over this subject, under the other provisions of the constitution, must be provided for, regulated, and controlled by congress, I cannot perceive any sound objections to the power of congress to regulate the remedies for marine torts, or for any other subject of acknowledged admiralty or maritime jurisdiction, by any appropriate legislation. Numerous acts have been passed by congress in providing and regulating remedies in reference to the various other subjects to which the judicial power of the United States is, in the same section of the constitution, declared to extend. Nor is it credible, either, that the legislative power of the states, prior to the adoption of the constitution, concerning the subjects of admiralty jurisdiction arising upon their own waters, and not connected with foreign or interstate commerce, is either still retained by the respective states, to the exclusion of congress, or been dropped out of the jurisdiction of both. In the *Case of Vessel Owners' Towing Co.*, above referred to, the injury was to an abutment of a bridge, which did not constitute a marine tort, and was not, therefore, within the admiralty jurisdiction. *Rock Island Bridge*, 6 Wall. 213; *City of Lincoln*, 25 Fed. Rep. 835-837. So far as applicable to cases not within the admiralty jurisdiction, the act of congress in limitation of liability could only rest upon its power over interstate or foreign commerce. The present case is one in reference to an alleged marine tort, and is as clearly within the admiralty and maritime jurisdiction. Upon principle, therefore, as well as upon the authority of the case of *The Seawanhaka*, I concur in the conclusion of CHOATE, J., on this point, and hold that the act is constitutional and valid in its application to this case, without reference to the question whether the Garden City was or was not engaged in interstate commerce. See *The Hazel Kirke*, 25 Fed. Rep. 601, 604-606; *U. S. v. Burlington, etc., Ferry Co.*, 21 Fed. Rep. 331.

2. For the petitioners it is contended that the jurisdiction of this court may be invoked to limit liability under the first section of the act of March 3, 1851, now section 4282 of the Revised Statutes; and that their remedy, under that section, is not confined to pleading the statute by way of answer in the different suits that may be brought against them at common law or in admiralty. I am not called on, however, to pass upon that question at this time, because, in my judgment, the loss in the present case does not come within the terms of section 4282. That section, as it now reads, is confined to "loss or damage which may happen to any *merchandise* whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire," etc. The word "goods" is omitted in the revision. The horses, trucks, harness, etc., lost in this case were in charge of the drivers, who are teamsters, and who came aboard the

ferry-boat as passengers, with their teams, on their way home at noon, without any goods or other load. The act was passed with reference to commerce and mercantile dealings. The term "merchandise" is, I think, used in its mercantile sense only. Horses and trucks may, indeed, be merchandise. They are so, in a mercantile sense, when shipped or put aboard a vessel as merchandise; but when they are driven aboard in charge of their drivers, who are passengers, and remain in their charge upon the trip, they are not shipped, taken in, or put on board as "merchandise." The liability of the ferry-boat for them is not a liability as for merchandise,—that is, the liability of a common carrier; but a wholly different and much more restricted liability,—namely, that for passengers, and their baggage. *Wyckoff v. Queens, etc.*, 52 N. Y. 32; *White v. Winnisimmet*, 7 Cush. 155. The claim of the owners in this case is not a claim for the loss of "merchandise" as such; but for loss of property in charge of the drivers. Sections 4283 and 4284 are more extended, and embrace "any property, goods, or merchandise." The petition must therefore be restricted to the other sections of the act. Since the foregoing was written I find the same result sustained by the careful opinion of the learned judge of the Eastern district of Michigan, in the case of *The Marine City*, 6 Fed. Rep. 413.

3. I am of opinion that it is not necessary to aver or to prove that the claims against the vessel are in excess of her value, as a condition of the jurisdiction of the court to entertain this proceeding. Giving to the act of 1851 the liberal construction, in furtherance of its general purpose, to which, by the rules and by the decisions of the supreme court, it is entitled, (*Providence, etc., v. Hill Manuf'g Co.*, 109 U. S. 578, 588-599; S. C. 3 Sup. Ct. Rep. 379, 617,) its objects are seen to be twofold: *First*, to fix a definite limitation of liability; *second*, to provide for the payment, *pro rata*, of all claims to the extent of the value of the vessel and freight. As an incident of the first object, the supreme court has, by the fifty-sixth rule in admiralty, expressly provided that the petitioners in this proceeding may contest all liability for the alleged loss, may have that point adjudicated before this court, and, if successful in establishing that defense, may have a decree exempting them from all liability whatsoever. *Providence, etc., v. Hill, etc.*, 109 U. S. 592, 595; S. C. 3 Sup. Ct. Rep. 379, 617. Section 4285, moreover, expressly declares that it shall be "a sufficient compliance on the part of the owner with the requirements of this title relating to his liability," etc., "if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee," etc., "from and after which transfer all claims and proceedings against the owner shall cease." Here is no qualification or condition that the claims shall be averred to exceed the value of the vessel. If such an averment is essential to jurisdiction, it would seem essential that it should be proved; which is certainly not the case, since the vessel may be adjudged not liable at all.

It occasionally happens that no claims whatever are proved, and sometimes a surplus has arisen, where the claims were less than the proceeds of the vessel sold; but it has never been contended that the decrees in such cases were void. *Briggs v. Day*, 21 Fed. Rep. 727. It is often impracticable, moreover, for the petitioners to know or to ascertain just what the amount of the losses is. It would clearly defeat the purpose of this law if all proceedings must be delayed, and no petition could be filed, until claims were actually *presented* to the owners in excess of the value of the vessel; or if the owners of the vessel must first make sure that the amount of the actual demands against them was in excess of the value of the vessel.

As stated above, one of the clear purposes of the law is to fix and declare a certain limit of liability; and, as incident to this, to determine whether the vessel is liable at all, and to determine this in a single proceeding, and not leave it to be litigated and possibly determined in contrary ways in as many different suits as there may be different demands. *Providence, etc., Co. v. Hill Manuf'g Co.*, 109 U. S. 593-595; S. C. 3 Sup. Ct. Rep. 379, 617; *In re Long Island Transp. Co.*, 5 Fed. Rep. 599, 612. Owners should be held entitled to commence these proceedings with reasonable promptness, in order to determine whether they are liable at all, and, if liable, then the extent of that liability, so that they may know speedily their situation as respects the future. The supreme court, in providing by rule for the determination of both these questions in this proceeding, clearly recognize, as it seems to me, the scope of this law as extending altogether beyond the mere adjustment of *pro rata* dividends in case of deficiency.

In the case of *The Benefactor*, 103 U. S. 239, 243, 244, the supreme court, in reference to this point, say:

"The fifty-sixth rule was merely intended to relieve ship-owners from the English rule of practice, which requires them, when they seek the benefit of the law of limited liability, to confess the ship to have been in fault in the collision. This was deemed to be a very onerous requirement, for in many if not in most cases it is extremely doubtful which vessel, if either, was in fault; and to require the owners of either to confess fault before allowing them to claim the benefit of the law, would go far to deprive them of its benefit altogether. Hence this court, in preparing the rules of procedure for a limitation of liability, deemed it proper to allow a party seeking such limitation to contest any liability whatever. \* \* \* They were intended to facilitate the proceedings of the owners of vessels for claiming the limitation of liability secured by the statute without regard to the time when such proceedings might be commenced, or whether before or after the general liability should be fixed. To require such proceedings to be commenced before a trial of the cause of collision would in many cases work injustice. In addition to the reasons already adverted to, it may be added that the owners of the vessel found in fault may often not know the amount of damage and loss sustained by the other vessel and her cargo. It may greatly exceed their expectations, and, contrary to what was originally known or supposed, may turn out to be much greater than the value of their own vessel and the freight pending thereon."

Doubtless a single claim less than the value of the vessel would be insufficient to sustain the proceeding. For in that case no purpose would be subserved by the special proceeding that would not be equally available by way of defense in an ordinary suit; and it is not to be presumed that congress intended in such a case to take away trial by jury. But when the loss or accident is one that by its nature, as in this case, involves injury to many persons, and the amount that each may claim is unknown and unascertainable, and several actions at law are already commenced, the case is in my opinion within the general intent of the act and of the supreme court rules to obtain in a single proceeding a binding and final adjudication both as to the fact of any liability at all, and, if any, the extent of that liability, and a speedy distribution to those entitled to a recovery.

4. A further objection to the jurisdiction is that the Garden City is excluded from the benefits of the act by the exception contained in section 4289, which provides that the act "shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." This exception is construed as meaning "used *only* in rivers or inland navigation." *Moore v. American Transp. Co.*, 24 How. 1, 36. As the Garden City is not a canal-boat, barge, or lighter, the case is not within the exception, unless it falls within the further provision of the statute as a vessel "used in rivers or inland navigation." The word "river" is thus defined: "A large stream of water flowing in a channel on land towards the ocean, a lake, or another river; a stream larger than a rivulet or a brook." *Webst. Dict.* "A large inland stream of water flowing into the sea, a lake, or another river; a stream larger than a brook." *Worcester.* "A stream flowing in a channel into another river, into the ocean, or into a lake or sea." *Stormonth.* "A large stream of water flowing through a certain portion of the earth's surface, and discharging itself into the sea, a lake, marsh, or other river." *Imperial Dict.*

From the language of these definitions, as well as from the universal understanding, a river means a considerable stream of water that has a *current* of its own, flowing from a *higher level*, that constitutes its *source*, to its *mouth*, where it debouches. The "East River," so called, has none of these three essential elements. It has no *source* distinguishable from its *mouth*, nor has it any *current* of its own. It is a mere strait or gut, connecting the Atlantic ocean, through Long Island sound on the east, with the Atlantic ocean, through the Upper and Lower bays of New York on the south. It is swept by the tides, and has no current except such as the tides give it. Its whole length from Throg's neck to Governor's island is about 17 miles. See *Laws N. Y.*, Act April 17, 1857, c. 763; *Devato v. 823 Barrels, etc.*, 20 Fed. Rep. 514, 515. At different parts it varies from a quarter of a mile to several miles in width. Having none of the essential characters of a river, it cannot be held to be within the exception of

the statute, merely because it happens to be called the "East River."

I am also of opinion that the Garden City was not employed in "inland navigation," within the meaning of this exception. The act was passed with reference to the whole country. The immediate connection of the words "inland navigation" with the word "rivers," in the statute, indicates, I think, the sense in which these words were intended; namely, navigation within the body of the country, as distinguished alike from navigation in the coast waters, or in the open ocean. It means navigation in the rivers, canals, and the minor lakes and streams, not lying upon the border of the country. The case of *Moore v. American Transp. Co.*, 24 How. 1, 36, 37, sustains, I think, this construction. The contention that the term "inland navigation" was used in contradistinction from "ocean navigation," merely, and embraced "all vessels navigating waters within headlands, and after they had passed the ocean," was in that case distinctly rejected, and the words "inland navigation" held to embrace "all internal waters."

Besides internal waters, that is, the waters within the body of the country, we have the external waters of the open sea, and the coast waters, which are intermediate between the two. The latter are most nearly allied to ocean navigation, because used, and necessarily used, by all ocean-bound vessels. In the recent act revising the international regulations for preventing collisions at sea,—March 3, 1885, c. 354, (23 St. at Large, 438,)—it is provided that the international regulations shall apply to navigation "upon the high seas, and in all coast waters of the United States," etc.; while in section 2 of the same act (page 442) the repealing clause is not to apply to the navigation of vessels within the "harbors, lakes, and inland waters of the United States." This act presents the contrast between the "coast waters," which are associated with the high seas and subject to the same rules of navigation as the high seas, and the "inland waters," which are excluded from these rules. "Inland navigation" in the act of 1851 refers, I think, to the same waters as the "inland waters" of the new rules. The "coast waters" manifestly embrace, not merely the waters that face the open sea, but the bays, the passages, the inlets, and the sounds formed by the islands that skirt the coast. Long Island sound is formed by the island of Long Island stretching to the south of Connecticut; the gut or passage called the "East River," is formed by the westward end of the same island. The one is no more "inland" than the other. The East river widens insensibly into the sound. No one would claim that Long Island sound belonged to the "inland waters" of the country, or that navigation there was "inland navigation." It was, indeed, the burning of the steamer *Lexington* upon Long Island sound on the thirteenth of January, 1840, that led to the enactment of the law of 1851. The leading case of *Norwich Co. v. Wright*, 13 Wall. 104, arose from a loss upon Long Island sound.

If, in the different cases that may arise, the language of the statute be departed from, and it be sought to decide, according to some supposed analogy, or some reason of the law, aside from its terms, what cases are within the exception and what without it, it will be found impossible to draw any rational or satisfactory dividing line. The gut or passage called the "East River" widens insensibly, as I have said, into Long Island sound. At every point from Hunter's point, where the Garden City stopped, to Fall river, near the eastern end of the sound, vessels make their regular trips from this port. There is no point at which any attempt to make a division or separation among these various lines, so as to hold those on one side within, and those beyond without, the statute, that would not be arbitrary, and fail of any rational or satisfactory distinction. The same must be said of the numerous steamers of various lines running down the upper and the lower bay for the carriage of goods and passengers, such as those running to various parts of Staten island, to Sandy Hook, to Perth Amboy, and other places. In these cases, as it seems to me, the only course is to adhere strictly to the language of the statute itself, and to let the dividing line, arbitrary as it is, and arbitrary as in any event it must be, remain precisely where the language of the statute has placed it. Wherever the navigation is wholly inland, or upon rivers, *i. e.*, rivers only and strictly, the exception applies. All other cases fall within the general provisions of the statute. The cases of *The War Eagle*, 6 Biss. 364; *The Sears*, 8 Fed. Rep. 365; and *The Mamie*, 5 Fed. Rep. 813,—are all manifestly different. The Garden City, in the present case, I hold to be not within the exception.

5. The remaining questions in the case relate to the legal liability of the petitioners for the loss of the horses and trucks in question. In the case of *Wyckoff v. Queens, etc.*, 52 N. Y. 32, 35, the rule of law as regards the liability of ferry-boats for goods and merchandise is stated by ALLEN, J., as follows:

"A ferry-man does not undertake absolutely for the safety of goods carried with and under the control of the owner; but he does undertake for their safety as against the defects and insufficiencies of his boat and other appliances for the performance of the services, and for the neglect or want of skill of himself and his servants."

The same rule, in substance, was applied in the case of *White v. Winnisimmet Co.*, 7 Cush. 155, and in *Clark v. Union Ferry Co.*, 35 N. Y. 485.

As regards the degree of care required for the safety of passengers, the duty imposed by law upon the carrier is "to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. \* \* \* The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands." *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 133. In *Caldwell v. New Jersey S. B. Co.*, 47 N. Y. 282, 288, it is said to be established

"that the carrier of passengers, especially in vehicles and conveyances propelled by steam, where the consequences of an accident from defective machinery are almost certainly fatal to human life, is bound to use every precaution which human skill, care, and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting new improvements to secure additional protection." In *Stokes v. Saltonstall*, 13 Pet. 181, the supreme court say that the undertaking and liability of a carrier of passengers "go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely;" and this has been repeatedly affirmed. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 456.

As respects the origin of this fire, there is no evidence of any specific acts of negligence attributable to the owners or their servants in charge of the boat. The fire broke out in the center-house near the smoke-stack. Nothing more is ascertained. There is no proof of any want of care immediately connected with the origin of the fire; and the proof shows that the construction of the center-house was in conformity with section 4470, so far as pertains to shielding the wood-work from the "boilers, chimneys, and stove-pipes."

Title 52 of the Revised Statutes contains numerous provisions for guarding against fire, applicable to "passenger steamers," and gives very broad powers to the inspectors for the purpose of carrying out those provisions. A compliance with the statutes and the requirements of the inspectors must be deemed, at least *prima facie*, a discharge of the legal obligations of the owners as respects the specific subjects covered by the statute. Upon a careful consideration of sections 4463 to 4500, which compose the second chapter of title 52, I am inclined to the opinion that many of those sections are not applicable to ferry-boats. By section 4464 all steamers carrying passengers, "other than ferry-boats," must have a certificate stating the number of passengers they may carry. Ferry-boats are not limited. The context in some of the sections shows that, by the phrase "passenger steamer," ferry-boats are not intended. In other sections, as in section 4481, applicable to steam vessels generally, only ferry-boats of less than 50 tons are excepted. See original of that section in act of February 28, 1871, (16 St. at Large, 442, § 7.) Section 4471 relates only to steamers permitted by certificate to carry a definite number of passengers, and is therefore not by its own terms applicable to ferry-boats. By section 4426 in the previous chapter, the hull and boilers of every ferry-boat must be inspected under the provisions of title 52; and that section further declares that "such other provisions of law, for the better security of life, as may be applicable to such vessels, shall, by the regulations of the board of supervising inspectors, also be required to be complied with, before a certificate of inspection shall be granted." Section 4470 requires every steamer carrying freight or passengers to be provided with suit-

able pipes, etc., to extinguish fire, and that "all woodwork or ignitable substances about the boilers, chimneys, cook-houses, and stove-pipes exposed to ignition, shall be thoroughly shielded," etc.; and before granting a certificate of inspection "the inspector shall require all other necessary provisions to be made throughout such vessels to guard against loss or danger from fire."

The section last referred to is, I think, undoubtedly applicable to ferry-boats. By this section, and section 4426, it is evidently competent to the inspectors to require ferry-boats to be provided with the same precautions against fire, so far as applicable, that are expressly provided in reference to other steam vessels carrying passengers. It appears, however, that no general regulations covering this subject have ever been adopted by the board of inspectors; so that it is far from clear to what extent the general provisions of title 2, c. 52, are applicable to ferry-boats as strict statutory obligations. By section 4493 the master and owners of any vessel are made liable for any damage sustained by any passenger, or his baggage, from fire or other cause, "to the full amount of damage, *if it happens through any neglect or failure* to comply with the provisions of this title, or through known defects or imperfections of the steaming apparatus, or of the hull."

The Garden City was inspected from time to time, and was approved, by the inspectors. Her general structure, equipment, and provisions against fire were, for the most part at least, in conformity with the various express provisions of chapter 2. Quite a number of specific objections were taken by the claimants relating to the number of fire buckets, life preservers, etc., to which I shall make no further reference, since they are plainly in no way connected with the origin of the fire, the failure to extinguish it at once, or the loss occasioned by it.

The objection made in reference to the hose is, however, material. Section 4471 provides that "every steamer permitted by her certificate to carry as many as fifty passengers or upwards shall be provided with a good, double-acting steam fire-pump, or other equivalent apparatus for throwing water, \* \* \* to be kept at all times in good order and ready for immediate use, having at least two pipes of suitable dimensions to convey the water to the upper decks, \* \* \* to which pipes there shall be attached good and suitable hose, *properly provided with nozzles, and kept in good order and ready for immediate service.*" The provisions of this section, as I have said, are not, *ex vi terminorum*, applicable to ferry-boats; but they may be made legally applicable to ferry-boats under the powers conferred upon inspectors by sections 4426 and 4470. A steam-pump and the standing pipes, hose, and nozzle, such as are required by section 4471, were provided in the construction of the Garden City, and were examined and approved by the inspectors. The evidence leaves no doubt that the inspection and the permit issued by the inspectors



were based upon the presence of these specific appliances for extinguishing fire. Other appliances were dispensed with in consequence of the presence of these; and, as this was the basis of the certificate of inspection and license, the provisions of section 4471, to that extent, must be deemed adopted by both the inspectors and the owners; and this adoption, and the license based on it, imposed an obligation on the boat to keep the appliances thus adopted "at all times in good order and ready for immediate use," as that section prescribes.

Aside from this statutory provision, however, considering the structure and use of these ferry-boats, the crowds of passengers with which they are thronged during certain hours of every day, and the great loss of life that at such times would inevitably follow an outbreak of fire, if not speedily checked, the legal rule of reasonable prudence and precaution can be held no less strict than the terms of the statute itself, namely, that the appliances for extinguishing fire shall be "kept at all times ready for immediate service." Such fires usually originate in the parts of the boat already somewhat heated, and they spread with great rapidity, as was the case in this instance. Unless they are checked within two or three minutes from the time they are discovered, there is little hope of avoiding fatal injuries; and if the appliances for extinguishing fire are not strictly kept "ready for immediate service," they might almost as well be dispensed with altogether. Reason and humanity both demand that readiness for "immediate service" be maintained in its strictest sense so far as is reasonably possible. In the case of *Pennsylvania Co. v. Roy*, above referred to, (102 U. S. 456,) the supreme court say that the carrier "is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise, upon his part, of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger."

Upon the evidence, I am constrained to find that this obligation of the carrier was not fully met in this case, and that in two particulars: *First*, in the absence of any nozzle attached to the hose; and, *second*, because the hose was so coiled and kinked that no water would flow through it until the kinks were got out of it by straightening it in the gang-way. Through these circumstances together the steam-pump, as I must find, was of no practical service. Rogers, the deck hand, shortly after leaving the slip, went to the pilot-house, smelt smoke, and was directed by the pilot to go below, and see what was the matter. He immediately went down two pair of stairs, leading through the center-house to the main deck. When going down the lower stairs, he saw, as he testifies, a small blaze of fire creeping upward along the northerly side of the center-house, from four to six feet above the main deck, and nearly opposite the smoke-stack; that is, outside of the jacket that surrounded it, and between that and

the steam-drum forward. He immediately shouted to the engineer below to turn on the fire-pump, which was done; and he grabbed the hose, which, as he says, was coiled up and hung upon a peg near the middle door of the center-house, at the foot of the stairs, and dragged the hose out on to the horse gang-way on the northerly side. The lower end of the hose was already attached to the standing pipe connecting with the steam-pump, as required; but the other end had no nozzle attached, and none was obtained in time to be attached. The reason for the absence of the nozzle was that it was customary to use the hose to wash the decks without a nozzle; and the hose had been coiled up and left as last used in that service, without the nozzle on. Although some varying statements are given by Rogers at different times, he says, in one passage, in answer to the question: "Did the water commence to come out of the hose before you took it off the pin, or after?" *Answer.* "As soon as I got the hose spread, so it wouldn't be kinked, or anything of that kind, the water come flying on to me." Other witnesses testify to aiding him in spreading the hose, and in getting the kinks out; and to the fact that during this time no water came through.

Several of the passengers who were upon that gang-way, and who testified to various other particulars in reference to the fire, saw no water played at all. Rogers says, and some other witnesses confirm him, that as soon as he got the kinks out the water came; and that he played, without the nozzle, upon the outside of the center-house, where, by that time, the fire had burned through; and that there was no difficulty in sending the water to the ceiling over the gang-way. I am bound to say, however, that in this part of his testimony Rogers seemed to be in difficulty; and his testimony was marked by such apparent constraint, uncertainty, and indecision as to make it doubtful, considering the contradictions in the testimony, whether he played the hose for any appreciable time before he was compelled by the heat to leave it. He estimates the time that he played the water at from one to two minutes; but, whether for a longer or shorter time, the hose was not used where it was most needed, namely, inside of the center-house where the fire was. The reason why the hose was not used there evidently was because it was not at first ready for immediate service. It had to be taken into the gang-way, straightened out, and the coils unkinked; and by that time, as it would seem, the fire had spread so rapidly that Rogers could not bear the heat at the center-house door, or, possibly, could not send the water without a nozzle to the point where he thought it most wanted. The time that it took him to get the hose playing he also estimates from one to two minutes. From the statements of other witnesses as to what they did after the fire broke out, and up to the time of leaving Rogers' side, before any water came through the hose, it is probable that the time was over two minutes; and this seems further probable from the circumstance that the fire had burned through the center-house, so

as to be seen from the gang-way by the time he got the hose ready to work.

Considering all the circumstances, I cannot regard such a condition of the hose and nozzle as meeting the requirement of the statute, or of reasonable diligence and prudence for the safety of human life. The same general rule of care applies to carriers of passengers on land and on the water. The degree of care and diligence must be commensurate with the dangers likely to be met. The readiness must be all that is reasonably practicable, and such as is likely to be of some actual use. In the overheated parts of a ferry-boat, like the center-house, where a small outbreak of fire will, if not checked, become in a few moments a great mass of flame, the requirement of "readiness for immediate service" is, in my judgment, not satisfied by anything less than a hose and nozzle kept in actual readiness for instant service; the nozzle being on, the hose attached to the pipe as this one was, and the hose also free from kinks, and kept so straightened out and arranged as that it may be directed upon the heated parts of the boat as soon as the steam-pump can be turned on. Had such been the preparations in this case, the evidence leaves no doubt that the fire could have been checked almost immediately, and within a minute after Rogers came down the second stairs. This could not have been later than the time when a bucket of water was thrown through the front window of the center-house, and seemed to the by-standers sensibly to have checked the fire. Rogers' description of the fire, as he saw it when he came down the second stairs, indicates that it had then made but little headway. Had the hose and nozzle been then stretched out, and thus in actual readiness for immediate service, he would within a few seconds afterwards have brought the hose to the center-house door and played directly upon the fire, which was then in a narrow compass, and have put it out, so that no considerable loss would have happened.

The best *data* furnished by the evidence as regards the time from the first alarm of fire to the arrival of the boat at her slip fully sustain, I think, the argument of the learned counsel for the petitioners. After the first alarm near Market street, the boat was probably stopped within a minute or a little over, in going through a space of perhaps 600 feet in the water; and under her reversed engines she was probably going full speed astern in about the same additional time and space. During these two minutes, or a little more, the tide would have carried the boat about 600 feet below Market street; and with her reversed speed, and the tide, she would have passed over the remaining distance to her slip in not exceeding two minutes more. While the shortness of the time within which the fire did its fatal work makes some of the other acts of negligence alleged evidently immaterial, that very fact emphasizes more strongly the necessity of keeping the appliances of the steam-pump in actual readiness for immediate service.

As to all the other charges of negligence in respect to the equipment, the rudder pin, and the handling of the vessel after the alarm of fire, I find that the petitioners and their servants and agents are not chargeable with fault contributing to the loss. I place my decision upon the single ground above mentioned, in order that if there be any error either in the principle adopted, or in its application to the facts, the error may the more easily be corrected on appeal.

A decree may be entered adjudging the petitioners liable to the claimants for the losses referred to with other provisions to be settled on notice.

### HATTON v. DE BELAUNZARAN and others.<sup>1</sup>

(District Court, S. D. New York. March 10, 1885.)

#### CHARTER-PARTY—DEMURRAGE—CESSER OF LIABILITY—DIFFERENCE OF FREIGHT—NOTICE TO AGENT—NO AGENT PRESENT—ADVERTISING.

The charter of the bark *Peeress* was in substance similar to that in the case of *Eisenhauer v. Belaunzaran*, *post*, 784. The vessel sailed from New York to Cadiz, where a recharter was executed to F. & Co. to carry a cargo of salt to Bahia, Brazil. The original charter provided that "lay days shall commence after the vessel is ready to discharge, and written notice thereof is given to the party of the second part or agent." Upon the "provisional settlement" at Cadiz, the captain executed his note to the Cassa Marittima for the difference of freight, payable absolutely after his arrival at Bahia, with a pledge of the ship and freight therefor. The vessel arrived March 4th, consigned to the "agents" of the recharterers. There were not then any agents of F. & Co. at Bahia, through delay in sending instructions in regard to this cargo; nor were there present any agents of the respondents in reference to this ship or cargo. Certain representatives of the respondents refused to have anything to do with it. Written notice of the vessel's readiness to discharge could not therefore be given to any authorized "agent" until some time after, when C. & Co. received cabled instructions from respondents and from F. & Co., and assumed the agency. Upon delivery of cargo there was no shortage, and the "estimated" freight was collected in full. The cargo at Bahia was worth no more than the freight, and the consignees therefore refused to pay any demurrage, though that was a lien on the cargo; and the cargo was therefore delivered on payment of the freight only. The note was paid in full from the freight collected, and the rest of the freight was applied in payment of the charter money. This suit was brought against the original charterers for the demurrage. *Held*, (1) that, although the note given was in form in excess of the master's authority, yet as the estimated freight was fully realized, the note truly represented F. & Co.'s share of the freight money received at Bahia; that as the recharter provided that "charterer's liability should cease on cargo's being shipped," and as this was the form of recharter that respondents had required the master to sign, respondents had in effect agreed that F. & Co. should not be personally held for demurrage at Bahia; that the master had no right, therefore, to deduct the demurrage claim as a set-off against the amount of the note, which truly represented F. & Co.'s share of the freight collected; that the demurrage was no lien on the freight, and hence the master did the respondents no legal wrong in paying the note in full. *Held*, (2) that as the recharter which the captain was required to sign expressly provided that the vessel should be loaded with salt, the captain could not be charged with fault in taking a cargo of less value than the freight and demurrage; and, as he secured the full value of the cargo, he could do nothing better

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

for the respondents, and was in no fault for delivering it upon payment of its full value as freight. *Held*, (3) that respondents, to entitle themselves to the benefit of the provision for "written notice" of discharge under their original charter, were bound to have an agent at Bahia, ready and authorized to receive such a notice. Not having any such agent there, they were liable for the vessel's demurrage from the time of her actual readiness, and damages for 12 days were allowed, as well as the moneys paid by the master for advertising for charterer's agent, and for cabling to New York.

In Admiralty.

*Wilcox, Adams & Macklin*, for libellant.

*Olin, Rives & Montgomery*, for respondents.

BROWN, J. The claim in this case is for demurrage for the detention of the British brig *Peeress*, at Bahia, Brazil, in the discharge of a cargo of salt shipped at Cadiz by Florez & Co., under a recharter, dated Cadiz, January 13, 1885. The vessel had been originally chartered by the respondents at New York, on the fourteenth day of October, 1884, for a voyage to Gibraltar and thence to Brazil, with the privilege of rechartering. The terms of the original charter and of the recharter were in substance identical with those in the *Case of Eisenhauer*, *post*, 784. Upon the "provisional settlement" of freight with Florez & Co., at Cadiz, the captain executed to the Cassa Marittima his note for £210 13s. 9d., containing similar provisions with those in the case cited, and he received a similar agreement from Florez & Co. On arrival at Bahia, about the first of March, 1885, there was delay in finding the consignees. The draft was paid in full before the complete discharge of the vessel. There was no shortage in delivery, but the lay days being exceeded, the captain became entitled to demurrage, under the original charter as well as under the recharter, at the rate of \$30 per day. I am satisfied from the evidence that the salt was worth nothing above the freight and charges, and that the claim for demurrage could not have been collected out of the cargo, besides freight. The master was unable, therefore, to collect any claim for demurrage, although that claim was made a lien on the cargo, both by the original charter, and by the recharter to Florez & Co. He was able to collect from the cargo the freight stipulated in the original charter and in the recharter, but nothing more. As there was no shortage on delivery, the amount of freight collected was precisely that estimated in the provisional settlement, and was just sufficient to pay the note that he had given on Florez & Co.'s account, together with the balance of the original charter money due to the vessel, and applicable to the respondents' credit on that account and no more. The note was paid in full. If the master, under the circumstances, had any right to deduct the claim for demurrage accruing at Bahia out of that part of the freight collected there and applicable to Florez & Co.'s account, then his payment of the note in full, leaving his own claim for demurrage unpaid, upon the principles of the *Case of Eisenhauer*, *supra*,

was a payment in his own wrong, and in violation of his duty to the original charterers, which would afford them a defense against the present claim.

By the terms of the recharter, however, to Florez & Co., they were not personally answerable for any demurrage at Bahia, because the recharter provided, "The charterer's liability to cease on the cargo's being shipped." *Sanguinetti v. Pacific Steam Nav. Co.*, 2 Q. B. Div. 238, 247. This was the form of the recharter that the original charterers required the master to sign at Cadiz. The respondents, therefore, in effect, agreed that Florez & Co. were not to be personally liable for demurrage at Bahia; but that the consignees at Bahia, or the cargo only, should be looked to for that claim. The freight collected at Bahia, less the last installment of the charter money payable there, belonged, however, to the recharterers. The balance of the charter money was paid in full out of the freight collected; and the respondents, as the original charterers, had no claim or lien upon the rest of the freight money going to Florez & Co.'s account, in respect to demurrage accruing at Bahia, because Florez & Co. were, by the recharter, absolved from liability for that demurrage. The only mode of enforcing the claim for demurrage was, therefore, either by the ship's lien upon the cargo, or by a personal demand against the consignees. But the lien on the cargo was worthless because the freight amounted to its full value; and the consignees were willing to pay, and offered to pay, the freight, but would not pay the demurrage. If there had been anything more or better that the captain could have done for the interests of the owners and of the respondents than to deliver the cargo upon payment of the freight alone, it would have been his duty to do so; but, as he secured the full value of the goods, clearly he could do nothing more and nothing better, and he is therefore in no fault. As the demurrage claimed, moreover, was not a lien on that part of the freight collected which belonged to Florez & Co., but only upon the cargo, and could not be charged against Florez & Co. personally, the demurrage claim could not be lawfully deducted from the note, or from the amount of freight belonging to Florez & Co. Though the note given was in form in excess of the master's authority, the respondents were not thereby injured; because, as it turned out, it represented only what belonged, under the recharter, to Florez & Co.

The real trouble in this case arose from the fact that the cargo taken aboard at Cadiz was not worth enough, on arrival at Bahia, to pay the claim that arose for demurrage, in addition to the freight, and that the recharterers were released from personal liability for the demurrage claim. As the recharter, which the respondents required the master to sign, expressly provided that she should be loaded with salt, the captain cannot be charged with any fault for taking a cargo worth less than both these claims; and the respondents, therefore, took the risk of the master's ability to satisfy any claims that might

arise for demurrage, out of the cargo. In most English charters that contain the cesser of liability clause, that clause is now conditioned upon the cargo's being of sufficient value to pay the demands upon it. Whatever may be the personal claim that the master or owners might have had upon the consignees or on Florez & Co., the respondents have the same rights. This does not affect the libelant's right to sue on the obligations of the original charter.

The vessel was ready to discharge at Bahia on Thursday, March 4th. Under the recharter her remaining 24 lay days would count from that day. The original charter, however, provided that the lay days for discharge should commence "from the time the vessel is ready to discharge cargo, and written notice thereof is given to the party of the second part or agent." By the recharter the ship was to be "addressed to charterer's agents at port of discharge;" *i. e.*, to the agents of Florez & Co. at Bahia. The captain saw Solomon Carvalho, who was the agent of Florez & Co. for some purposes, on the second of March, and frequently after that date; but he told the captain that he knew nothing about this cargo, and could do nothing about it. It was not until after the 10th, when the captain cabled to New York, that directions from the respondents were received by Mr. Carvalho to take charge of the Peeress, and at about the same time similar directions were received from Florez & Co. at Cadiz.

If the provision of the original charter requiring written notice of readiness to discharge was applicable at Bahia in the absence of any similar provisions in the recharter, the evidence shows that there was no agent, either of the respondents or of Florez & Co., authorized to act in behalf of either of them, at Bahia, at the time when the ship was ready to discharge, and when the captain endeavored to give the notice required. The absence of written notice cannot, therefore, avail the respondents, because both they and the recharterers were chargeable with negligence for having no agents there to whom such notice could be given. The respondents are liable, therefore, for delay in discharging after March 4th, deducting 24 lay days. As the vessel was not discharged until the 13th, the delay was 12 days, which, at \$30 a day, amounts to \$360. The libelant is also entitled to the additional charge of \$36.88 for cabling from Bahia, and for the advertising rendered necessary from the absence of any agent there to attend to the ship or cargo.

A decree may be entered for \$396.88, with interest from April 13, 1885, and costs.

**EISENHAUER v. DE BELAUNZARAN and others.<sup>1</sup>***(District Court, S. D. New York. March 10, 1886.)***CHARTER-PARTY — CESSER OF LIABILITY CLAUSE — RECHARTER — DEPARTURE — PROVISIONAL SETTLEMENT — DIFFERENCE OF FREIGHT — NOTE — VOLUNTARY PAYMENT — DISCHARGE.**

Respondents chartered the bark **F.** for a voyage from New York to Spain, and thence to Brazil. The charter-party provided: "Any difference in freight to be settled before the vessel's departure from port of loading; if in charterer's favor, by captain's draft upon his consignees, payable 10 days after arrival of vessel at port of discharge. Charterer's responsibility for amount of outward charter to cease when vessel is loaded with outward cargo, and bills of lading are signed for same. If required by charterers, captain to sign recharter without prejudice to this charter." At Cadiz, the captain, under the above provision, executed a recharter of the vessel to F. & Co. to carry salt to Santos, Brazil, at 22 shillings per ton delivered, and the difference of freight being in charterer's favor, the captain gave a note to the Cassa Marittima for the difference, payable absolutely 15 days after his arrival, at Santos, with a pledge of the ship and freight for payment. On such arrival the cargo was found to be short, and the freight on the amount delivered, after paying the note in full, not being equal to the balance of charter money due, the captain brought this action against the original charterers for the amount, which is equal to the freight on the shortage of cargo. *Held*, (1) that the cesser of liability clause in the charter applied to the voyage from New York to Spain, but did not apply to the voyage from Cadiz to Santos, and that a similar clause in the recharter was not available to the respondents. *Held*, (2) that the settlement, and the draft given in pursuance of it, as contemplated by that clause of the charter, when the true amount of freight was dependent upon the amount of cargo delivered, were not absolute and final, but provisional only, and subject to correction and deduction, for any just cause by which the amount of freight at port of discharge might become less than what had been estimated in the settlement, through no fault of the ship; and this, whether the right to such deduction were expressed in the draft or not; that the master was bound to deduct, from the estimated settlement and from the note, before payment, any sum found not justly applicable thereto; and that the master's receipt of sufficient freight moneys, applicable to the payment of the original charter money, inured as a payment thereof, and discharged the charterers. *Held*, (3) that the making by the master of a note to the Cassa Marittima for an absolute payment, with a pledge of the ship and freight, without being required to do so by the charter or the recharter, and without providing for a possible reduction of freight, was a departure from the original charter, and his payment of the note out of freight money received was a voluntary and wrongful payment, which discharged the original charterers from liability for the balance of the charter money.

**Action for Charter Money.***Wilcox, Adams & Macklin*, for libellant.*Olin, Rives & Montgomery*, for respondents.

**Brown, J.** The libel in this case was filed to recover the sum of \$576.29, the balance of charter money alleged to be due from the respondents, as charterers of the British bark **M. J. Foley**, under a charter-party executed between the respondents and the master, at the city of New York, on the eleventh day of October, 1884, for a voyage to Spain, and thence to Brazil, for the round sum of £878;

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.



£400 payable on delivery of "outward cargo," and the balance on the "delivery of the Brazil cargo at the final port of discharge." The installment for the outward voyage to Cadiz was paid, and a recharter was there executed by the captain to Florez & Co., dated December 29, 1884, under the provisions of the original charter, which provided that the captain, if required by charterers, should sign a recharter, "without prejudice to this charter." Under the recharter the vessel was loaded at Cadiz for Santos, Brazil, with 606 tons of salt, as supposed, the freight to be at the rate of "22 shillings per English ton delivered." Before sailing from Cadiz, upon a "provisional settlement" between the master and Florez & Co. in respect to the freight for the Brazil voyage, after deducting from the estimated freight money some \$300 advanced by Florez & Co. to the master in cash, and the sum of £478, the unpaid installment of the original charter money, there remained a balance of £264 7s. 5d. of the estimated freight as per recharter, for which balance the captain gave Florez & Co. his note, payable to the order of the Cassa Marittima, of Genoa, 15 days after his arrival at Santos, with an hypothecation of the vessel and freight as security.

On the discharge of the cargo at Santos, the weight reported by the custom-house weigher was 543 tons only, and the master collected from the consignees of the cargo freight upon 543 tons only. The delivery not having been completed within 15 days after arrival at Santos, the note was paid in full before the weight of the cargo discharged was known. The shortage of 63 tons, which appeared after payment of the note, consequently left the master in arrears, for the balance of the charter money, to an amount equal to 22 shillings per ton upon the shortage, for which deficiency this libel is filed against the original charterers.

The case turns, in part, upon the construction of the special provisions of the charter, and in part upon the question of diligence or negligence of the master at Santos. The charter contains the following clauses:

"The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading; if in vessel's favor, in cash at the current rate of exchange, less insurance; if in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Charterers' responsibility for amount of *outward charter* to cease when vessel is loaded with *outward cargo*, and bills of lading are signed for the same. Vessel to have an absolute lien upon the cargo for all freight and demurrage. If required by charterers, captain to sign recharter, without prejudice to this charter."

The respondents claim that the clause providing for a cesser of liability on the part of the charterers should be applied to the voyage from Cadiz to Brazil, as well as to the voyage from New York to Cadiz; both because the charterers, by reason of their absence from Santos, are within the general reason for inserting this provision, and

also because the voyage from Cadiz to Santos was a part of one entire "outward voyage" from New York to Santos.

The cesser of liability clause, as it is called, is now common in charter-parties, and has been often presented for adjudication in the English courts. Its general object is to free the charterer from responsibility at distant ports, arising from circumstances not within his control, or subject to his supervision. It is usually associated, as in this case, with an absolute lien upon the cargo in favor of the ship for her freight and demurrage; and the general construction of the two clauses together is to consider the intent of the parties to be that the ship shall look to her lien on the cargo for all her claims arising after she leaves the port of loading, instead of relying on the personal responsibility of the charterer; and if the language exempting the charterer from the time the vessel sails is clear and explicit, he will be protected even against claims for prior delays at the place of loading, as well as for claims at the place of discharge, though he were his own consignee. *Sanguinetti v. Pacific Steam Nav. Co.*, 2 Q. B. Div. 238-247; *French v. Gerber*, 1 C. P. Div. 737, (affirmed, 2 C. P. Div. 247;) *Bannister v. Breslau*, L. R. 2 C. P. 497; *Francesco v. Massey*, L. R. 8 Exch. 101; *Kish v. Cory*, L. R. 10 Q. B. 553; *Gardner v. Frechmann*, 15 Q. B. Div. 154.

Exemptions of this kind, however, are not to be extended beyond the fair import of the language of the charter. *Boult v. Naval Reserve*, 5 Fed. Rep. 209. In that case, which in many respects resembles this, but in which no draft had been given to the shippers, and the freight was made payable per ton on weight delivered, it was held by MORRIS, J., that the shippers could not collect the excess as estimated upon shipment, but must bear the loss of freight arising from a shortage happening through no fault of the ship, notwithstanding the further stipulation that the charterers would not be held liable for loss of freight arising from any cause beyond their control.

In the present case it is not necessary to determine what would have been the effect of the cesser of liability clause had it applied, under the original charter, to the voyage from Cadiz to Santos, inasmuch as the fair construction of the charter does not, in my judgment, admit of the application of the cesser clause to the latter voyage. The printed form of charter used was one designed for an outward and a homeward voyage. Wherever the word "homeward" was used in the printed form of this charter, the words "Brazil" or "to Brazil" are inserted. The charter thus contemplates a voyage in two parts: *First*, to Cadiz; and, *second*, from Cadiz to Brazil. The cesser clause is in print, and the printed form does not cover the homeward voyage; nor is anything inserted in this clause as to the "Brazil voyage," or the "Brazil cargo," although these are several times referred to in the charter by that form of expression. On the contrary, the cesser clause in the printed form is limited to the "amount of outward charter;" that is, to the installment payable for the voy-

age from New York to Cadiz. The reason for not having a similar provision for the homeward cargo in the printed form was doubtless because no such provision was necessary where the final discharge was to be in the charterers' own port, since they could there look after their own interests. The second part of the voyage, however, in this case being to Brazil, where the charter was to terminate, there might be, no doubt, similar reasons for inserting the cesser clause as respects that part of the whole voyage; but, in using the blank form designed for homeward voyages, there was no provision for other than the outward voyage, and the parties have not supplied the omission by inserting any other similar provision for the Brazil voyage. The court cannot supply it for them. It would be going beyond the limits of fair construction to interpret the word "outward" in the cesser clause in any different sense from that in which it is used in all the other parts of the charter; and in every other place, as I have said, it is used in distinction from the "Brazil voyage" or the "Brazil cargo." I cannot hold the respondents discharged, therefore, by virtue of the cesser clause in the original charter.

2. In the recharter executed by the master to Florez & Co. at Cadiz, a similar provision is inserted: "Charterers' liability to cease on cargo being shipped and advances made." But the respondents are not the charterers under that charter. They were not members of the firm of Florez & Co., nor pecuniarily interested in that firm. The terms upon which the respondents transferred their rights under the charter to Florez & Co. do not appear, and are not material. Florez & Co. having acquired the right to freight the ship from Cadiz to Santos, they provided, by the recharter, for the carriage of a cargo of salt, at the rate of 22 shillings per English ton of 2,240 pounds delivered. Florez & Co., as charterers under the recharter, did not bind themselves to the payment of the original charter money; and the recharter must be assumed to be just what the original charterers framed and required the master to sign. The cesser of liability in the recharter is not available to the original charterers.

3. The original charter, however, did further provide as follows: "Any difference in freight to be settled before the vessel's departure from port of loading; if in charterers' favor, by the captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge." This clause is as applicable to the second part of the voyage as to the first. There is nothing in its language to limit it to the outward voyage. Upon the recharter, therefore, I think the captain might have been required to make such a provisional settlement at Cadiz, and to execute such a draft, as the original charter required. The recharter, however, did not contain any express clause to that effect, and I have great doubt, therefore, whether Florez & Co. had any right to such a settlement in advance. If they had not, the captain's note was given voluntarily, and at his own risk, and could not prejudice the respondents' right to have the freight collected applied, first, to the

payment of the balance of the charter money. But assuming that this provision of the original charter became applicable to the recharter, then, upon the settlement made at Cadiz, if, as respects the outward cargo from that port, a draft had been given in pursuance of and strictly according to the terms of the original charter, the case would present the question whether the settlement made at Cadiz should be deemed a final one as respects the recharterer, and the draft given under it payable absolutely and at all events; or whether the settlement should be held provisional only, and the amount of the draft be held subject to deduction for such just causes as might appear at the port of discharge. For, if the original charter bound the master to pay absolutely the draft given at the port of loading under the recharter that the original charterers required him to execute, then it is clear that the original charterers took the risk of any final deficiency in payment of the charter money out of the freights earned, after paying the draft, if this deficiency arose without the fault of the vessel.

I have not found any case in which the nature of the "settlement" of the freight at the port of loading, under a clause like this, has been referred to, save in that of *The Naval Reserve*, 5 Fed. Rep. 209, above cited. But there had been no recharter in that case; nor was any "settlement" in that case stipulated for; nor had any draft been given, although the original charter provided for the execution of a draft for the difference. The suit was brought by the shippers upon the original estimate of freight, and it was held that they could not recover.

The intent of this clause must be gathered, not from its language alone, but in view of the circumstances likely to arise, and within the presumed contemplation of the parties. In the first place, the master had no means of knowing the exact weight of cargo taken aboard. The bill of lading states, "Weight and quality unknown." The cargo was loaded, and required to be loaded, by the charterers' stevedore; and the draft was made, not upon the final adjustment of the freight, but upon a "provisional settlement," and "estimated" freight. There are, moreover, the ordinary contingencies of such voyages. The cargo might be lost or jettisoned, in whole or in part, or damaged, so that the estimated freight would not be recoverable. There might be mistake, or even fraud, in the recharterers as respects the weight put aboard; or a loss of weight upon the voyage through natural causes. It is scarcely credible that it should be the intention of a clause like this to cast upon the ship the liability for all these contingencies, and thus to make her, in effect, an absolute insurer of the collection of the exact estimated amount of freight represented by the draft. Moreover, there is nothing in the charter that requires any acceptance of the draft by the consignees before payment. The time given after arrival is presumptively for the purpose of enabling the master to collect sufficient freight money before payment, and to ascertain what corrections, if any, are to be made upon the estimated freight repre-

sented by the draft. In this case, the exact amount of freight could not possibly be ascertained until discharge, because the amount of freight was made dependent upon the amount of cargo *delivered*. It would seem very improbable, if not absurd, therefore, to suppose that the settlement stipulated for at the port of loading, as respects a cargo thus freighted, was intended to be a final settlement; or anything more than a "provisional settlement" upon a mere "estimate" of the amount of freight. In this case, the parties themselves have, in their own account, described the settlement as one of that character. The construction which the parties, in this instance, have put upon this clause, in terming it a "provisional settlement" upon "estimated" freight, is, I am satisfied, the proper and the legal one. If, in any case, the settlement stipulated for could be held intended to be a *final* settlement, it could only be where the amount of freight itself is definitely fixed by the charter or bill of lading; and not, as in this case, where the freight is made dependent upon the weight of cargo delivered.

I must hold, therefore, that any draft given pursuant to such a settlement upon a charter in which the true amount of freight is dependent upon the amount of cargo delivered, is subject to correction and deduction, for any just cause, by which the amount of freight recoverable at the port of discharge becomes, through no fault of the ship, less than that estimated in the settlement; and that in any such draft the master may properly have inserted a provision for a deduction accordingly. If no clause providing for such a reduction is contained in the draft, inasmuch as such a draft, payable only upon the contingency of the vessel's arrival, is not a negotiable instrument so as to give the holder any greater rights than the promisee, it would be equally subject to the same deductions as if that right had been expressed in it. As the captain, therefore, would have the right to make such deduction, it would be his duty to ascertain the true amount payable before paying such a draft, and to provide, first, for the full claims of the ship under his charter; because the amount applicable upon the draft would be only such as remained after the ship's charter money was paid. The master having the money derivable from the freight under his control, by means of his lien upon the cargo, and being bound to apply that money first to the ship's own charges upon it for the original charter money, his payment of the draft in full, without first protecting the ship's prior claims and the charterers' right to the appropriation of the freight earned to the discharge of the charter money, would be a payment in his own wrong, which would relieve the charterers from liability *pro tanto*. The captain's receipt of the freight money, sufficient to pay the charter money, would operate as a payment and discharge of the charterers' obligation, excepting so far as the master might have legally created superior liens upon the freight under the exigencies recognized by the maritime law.

In the present case it appears, as above stated, that, though a set-

tlement and draft were required to be given at the port of loading by the original charter, they were not required by any clause in the recharter. So far as appears from the evidence, therefore, the acts of the captain in making the "provisional settlement," and in giving a note for the benefit of Florez & Co., the recharterers, were voluntary on his part, and unauthorized by the respondents, the original charterers. Though the latter might, under the original charter, have required the master to make such a settlement, and give a draft upon the recharter, they did not do so. For this reason, also, it would seem to have been done wholly at the vessel's risk.

Again, the note given by the master to Florez & Co. was a wholly different instrument from that contemplated by the original charter. It was, in effect, a promissory note executed by the master to the Cassa Marittima, providing for the absolute payment to the bank of £264 7s. 5d., "value received on above freight for my last necessary expenses in order to undertake a voyage from Cadiz to Santos, subject to the rules of Cassa Marittima, copy of which I had, and by terms of it I have pledged my vessel and freight, giving the same precedence over every other credit whatever." In truth, less than one-quarter of this sum was advanced to the master, even if that much was for "last necessary expenses." Upon the master's executing this note and pledge to the Cassa Marittima at Florez & Co.'s request, the latter executed to the captain the following agreement:

"For the amount of cash advanced to defray port charges and difference of freight resulting from the rechartering of the ship,—in all, £264 7s. 5d.,—the captain has given a guaranty or draft in the annexed form; *Messrs. Florez & Co hereby exempting* the captain and owners from all extra responsibilities, in any, arising therefrom, and other [than those] to which the ship is bound by the terms and conditions of the C. P. dated New York, eleventh October, 1884."

From this agreement it is evident, not only that the note given to the Cassa Marittima was a wholly different obligation from that contemplated by the original charter, but that both Florez & Co. and the captain understood that fact; and that the captain received the contract of Florez & Co., agreeing to exempt, and probably to indemnify, him from all this extra responsibility. If that was not the meaning of the agreement last cited, the only other meaning that I can attach to it is that the master should not be required to pay the note according to its terms, but only according to the original responsibilities and rights existing under the original charter. In either case it seems clear that the payment of the note in full, and the diversion thereby of a part of the freight earned, from the payment of the first charge upon it, namely, the payment of the balance of the charter money, was a voluntary, wrongful, and negligent payment by the master, which operates as a discharge *pro tanto* of the original charterers; or it might be treated as a ground of legal recoupment by the respondents, to the extent of their liability, by reason of the master's wrong-

ful conduct. Macl. Shipp. 484; Abb. Shipp. 414-420; 1 Maude & P. 387; *Holdsworth v. De Belaunzaran*, 34 Hun, 382.

Upon these views of the case it become unnecessary to examine the further question whether the ship was not also negligent at Santos, as respects the actual amount of salt delivered. The great weight of proof would seem to show that 606 tons were put on board at Cadiz, and that there were no causes of any considerable loss in operation during the short and pleasant voyage to Santos. There are various circumstances that point to the probability that the deficiency of 63 tons was owing to some mistake or fraud at Santos, rather than at Cadiz. It was the duty of the ship to the original charterers—most especially in view of the note for the difference which the captain had executed—to observe diligently the weight of the cargo discharged. Upon that branch of the case, however, the testimony is embarrassing; and, as the views previously expressed are sufficient, in my judgment, to prevent recovery, I do not consider further the question in relation to the actual amount discharged at Cadiz.

The libel is dismissed, with costs.

### THE SURREY.<sup>1</sup>

#### DIXON v. THE SURREY.

(*District Court, S. D. New York. February 23, 1886.*)

#### 1. CARRIAGE OF GOODS BY VESSEL—BILL OF LADING—STIPULATIONS—DELIVERY OF CARGO—NOTICE TO CONSIGNEE—CARE OF GOODS—MARITIME DUTY.

A stipulation in a bill of lading that cargo may be landed "without notice to and at the risk and expense of the consignees of the goods after they leave the deck of the ship" does not relieve the master from the duty of using ordinary and reasonable care for the safety of the goods until reasonable notice of discharge is given, or a delivery made. This duty of ordinary care to save the cargo from loss is a maritime duty, imposed by law upon the master in all situations until delivery is effected. The lack of such care is negligence, from which no stipulation exacted by the carrier can exempt him.

#### 2. SAME—CONSTRUCTION—"CONSIGNEE'S RISK AND EXPENSE."

Construed in connection with the ship's duty under her ordinary agreement to deliver "in like good order and condition," the stipulation means that the goods may be landed at a proper time and place, though without notice to the consignee; and that upon the ship's taking reasonable care of them afterwards, before notice of discharge, they will be at consignee's risk and expense; but if discharged at an improper time or exposed to known and imminent peril of loss, without due notice, the ship will be held liable for breach of duty.

#### 3. SAME—DELIVERY OF FRUIT IN COLD WEATHER—DUTY OF SHIP.

Bills of lading were given at Palermo for 200 cases of lemons, deliverable to order, received on board the steam-ship P., designed to be sent from New York to Canada by rail. The lemons were subsequently transferred at Pa-

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

lermo to the steam-ship S.; but the consignee was not notified of such reshipment, and, expecting the goods at New York by the P., paid no attention to the arrival of the S. The latter waited a few days after her arrival, on account of the coldness of the weather, but finally discharged her fruit, the weather still remaining cold, and the consignees of all the rest of the fruit being on the dock ready to receive and care for their consignments. No one appearing to claim the 200 cases of lemons, they were left on the dock and speedily frozen. *Held*, that a vessel is bound to make a delivery at a suitable time; that a discharge on the dock, without notice, is not a legal delivery, and a discharge at a time when for want of notice the goods cannot be removed by the consignee before they would be destroyed by frost is not a discharge at a suitable time, and not protected by the above stipulation; that the ship was therefore liable for the value of the fruit frozen; and that the S. was further chargeable with negligence in sailing without any copy of the bill of lading, which would have apprised her that the goods were destined for Canada, and that the non-appearance of any consignee was owing to some mistake arising out of the transshipment from the P. to the S.

In Admiralty.

*Hyland & Zabriskie*, for libelants.

*E. B. Convers*, for claimant.

BROWN, J. This libel was filed to recover the value of 200 cases of lemons brought by the steam-ship Surrey from Palermo to New York, and discharged at Harbeck's stores, Brooklyn, on January 26, 1885, and there destroyed by frost. The lemons were shipped at Palermo by the International Line, and a bill of lading given by the agents of that line to the shipper, reciting the receipt of them on board the steam-ship Penygghent, by which vessel they were expected to be forwarded. For some reason the Penygghent was delayed, and the steamer Surrey was chartered by the line to run in her place; and the lemons in question were accordingly laden on board the Surrey. No bill of lading was given by the Surrey. The previous bill of lading, reciting the shipment on the Penygghent, made the goods deliverable to order in New York. That bill of lading was indorsed by the shippers, and forwarded by them to Dixon Bros., Montreal, for whom the goods were shipped, to be forwarded thither by rail from New York. At the top of the bill of lading signed by the agents of the line is a memorandum in red ink, "For transshipment for Canada." Dixon Bros., on receipt of the bill of lading, sent it to their agent in New York to attend to the receipt of the goods from the steamer, and to forward them to Montreal. During the week previous to January 21st, about which time the Penygghent was expected, the agent of Dixon Bros. called several times at the office of Seager Bros., the agents of the steam-ship line in New York, and stated that he expected fruit by the Penygghent, and inquired when her arrival was expected. No information as to the Penygghent could be given, or obtained; but the expected arrival of the Surrey was conspicuously bulletined in the office of the agents. No notice, however, of the transfer of the fruit from the Penygghent to the Surrey was received either by Dixon Bros., or by Seager Bros., the agents of the line. In



the ordinary course of business the latter should have received notice of the transshipment; and there was evidence at the trial that such notice had been sent to them, but was not received, owing to some irregularities in the mail. There was some evidence, also, though not of a very satisfactory character, that notice of the transfer to the Surrey had been given to the shipper at Palermo. His testimony on this point was not obtained.

Only a small amount of fruit, some 4,500 cases, was brought by the Surrey. After several days of waiting for mild weather, on the morning of the 26th, the consignees of all the fruit except the 200 cases in question, by their representatives at the wharf, determined to accept the delivery of the fruit on that day; and accordingly the whole number, 4,500 cases, were landed upon the dock. The day proved cool. At 11 o'clock A. M. the thermometer was 29 deg. Fahrenheit; at 3 P. M. 25 deg.,—an exposure that such fruit could not bear for more than three or four hours without being destroyed. The number of boxes, however, being small, and the rest of the consignees being prepared to remove their fruit away at once, all the rest was removed without injury. But the libelants and their agent having no knowledge that the fruit had come by the Surrey, or that it was to be discharged, and no one else giving the 200 cases any attention, those cases were frozen and destroyed.

The weather on the 26th was beyond question unsuitable for the discharge of fruit, except upon the actual presence and readiness of the consignees to remove it immediately. A vessel is bound to make a delivery, and a delivery at a suitable time. A discharge upon the wharf, without notice to the consignee, is not a legal delivery; and a discharge at a time when, for want of notice, the goods cannot be removed by the consignee before they would be destroyed by frost, is not a discharge at a suitable time. The vessel in this case is therefore clearly liable, unless she is protected by the stipulations of the bill of lading.

The bill of lading recited the shipment on board the *Penyghent*, giving "liberty to tranship any part of the cargo by steamer [blank]." Under this blank power of transshipment I shall assume that the goods were lawfully transferred to the Surrey; and that the latter is entitled to all the benefits, and subject to all the obligations, of the bill of lading given for the *Penyghent*, and that notice of the transfer was given to the shipper at Palermo. The bill of lading provided that the goods should "be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the port of New York, unto order or assigns." The following stipulations were also added:

"The collector of the port is hereby authorized to grant a general order immediately on entry of the ship at the custom-house, New York. \* \* \* Simultaneously with the ship's being ready to unload the above-mentioned goods, or any part thereof, the consignee of said goods is hereby bound to

be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge, \* \* \* and, in default thereof, the master or agent of the ship, and the collector of above port, are hereby authorized to enter the said goods at the custom-house, and land, warehouse, or place them in lighters, *without notice to and at the risk and expense of the said consignee of the goods after they leave the deck of the ship*; and the owners of the ship are to have a lien on said goods until the payment of all costs and charges so incurred."

The arrival of the ship was entered in the custom house on the 21st. On the same day, at 2:30 P. M., a general order was obtained from the collector for the landing of her cargo, together with a permit for the goods to remain on the wharf 48 hours from that time. The permit last named directed the custom-house inspector, at the expiration of 48 hours, to send the cargo remaining on the wharf, not permitted, to the proper general order store. The time covered by this permit had expired nearly three days before this fruit was landed. There is no evidence whether the permit was renewed or not.

It is a pervading rule of the maritime law that the master of a vessel intrusted as carrier with the custody of the property of a distant owner is bound to exercise reasonable care of the goods until delivery pursuant to the contract. This duty of reasonable care for the preservation of the property from loss arises in all situations and in all emergencies. *Machl. Shipp.* 428-430, 437, 443; *Cargo ex Argos*, L. R. 5 P. C. 135; *The Spartan*, 25 Fed. Rep. 44, 56. It is in accordance with this general obligation that, in the absence of any special stipulations in the bill of lading, if a cargo be duly landed, on notice to the consignee at the port of destination, and the consignee fails to appear, or refuses to take the goods, the master cannot abandon them, but is responsible for reasonable care of the goods, and must either hold them as bailee, or store them on the shipper's account. *Richardson v. Goddard*, 23 How. 39; *The Grafton*, 1 Blatchf. 173, 175; *Redmond v. Liverpool, etc.*, 46 N.Y. 578; *McAndrew v. Whitlock*, 52 N. Y. 40, 46; *The City of Lincoln*, 25 Fed. Rep. 839, and cases there cited. Where the stipulations of the bill of lading require the consignee to be present and receive the goods as soon as the vessel is ready to unload, and that they shall be at the consignee's risk as soon as landed on the dock, and the consignee is duly notified, and attends in order to accept the goods as landed, and takes more or less charge of them, the stipulation is held to exempt the ship from subsequent loss or damage. *The Santee*, 2 Ben. 519; S. C. 7 Blatchf. 186; *The City of Austin*, 2 Fed. Rep. 412; *The Kate*, 12 Fed. Rep. 881. In such cases, as the consignee has due notice of discharge, and accepts the goods, the duty of protecting the property is cast by the contract upon him, and the ship is relieved. In the case of *The Santee*, 7 Blatchf. 186, 189, WOODRUFF, J., says: "On the extreme question, what, under such a bill of lading, the carrier should do in a case in which the consignee could not be found, or should not appear at all to receive

the goods, it is not necessary to express an opinion." That is the precise question presented in this case. It is answered, in my judgment, by the general rule of the maritime law above cited.

As respects all such stipulations inserted by the carrier for his exemption from liability, the ordinary rule is that they are to be strictly construed. They are not to be extended by implication beyond the fair import or necessary meaning of their terms. Still less do they exempt from negligence, or from the duty of ordinary care imposed by law upon the carrier, unless that be expressly stated, or unless the stipulations can otherwise have no effect at all. Thus, a general provision that goods shall be carried at the "owner's risk" does not excuse the carrier from the duty of ordinary care. *New Jersey St. Nav. Co. v. Merchants' Bank*, 6 How. 344; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 181; *Mynard v. Syracuse, etc.*, 71 N. Y. 180; *Cannfield v. Baltimore & O. R. Co.*, 93 N. Y. 532; *Holsapple v. Rome, etc.*, 86 N. Y. 275. Under the decisions of the supreme court in *Railroad Co. v. Lockwood*, 17 Wall. 357, and *Express Co. v. Caldwell*, 21 Wall. 264, and *Bank of Kentucky v. Adams, etc.*, 93 U. S. 174, 181-184, it is well settled in the federal courts that all stipulations, indirect as well as direct, inserted by the carrier for exemption from loss by his own negligence, are void. *The Hadji*, 20 Fed. Rep. 875.

From either of the above points of view, I am of opinion that the stipulations of the present bill of lading do not exempt the Surrey from responsibility for the loss of the goods under the circumstances of this case. The very terms of the bill of lading, although authorizing the ship to land the goods when she was ready to unload, without notice to the consignee, and at his risk, do not purport to relieve the ship from her previous agreement to deliver the goods "in like good order and condition;" nor to absolve her from her general maritime duty to take reasonable care of the goods in all situations; nor to authorize a delivery at an improper time; nor voluntarily to expose the goods to obvious peril of destruction. None of these exemptions can therefore be attached to this stipulation by implication. It is limited by legal construction, as the clause providing for carriage at the "owner's risk" is limited in the cases above cited. The agreement to deliver "in like good order and condition" is incompatible with the broad exemption claimed by the ship under the special clause. Construed strictly, and so as to harmonize with the ship's duty to make a good delivery, the stipulation means that the goods may be, indeed, landed at a proper time and place, though without notice to the consignee; and that, upon the ship's taking reasonable care of them afterwards, they will be at the consignee's risk and expense; but if discharged at an improper time, or voluntarily exposed to known and imminent peril of loss, the ship will be held liable for her breach of duty. *The Aline*, 25 Fed. Rep. 562. Again, as the duty to take reasonable care of the goods until proper notice of discharge is given, or a delivery is completed, is not affected by this

stipulation, the failure to take such reasonable care of the goods in the mean time is negligence, from responsibility for which no stipulation exacted by the carrier can exempt him. *Bank of Kentucky v. Adams, supra.*

I adhere, therefore, to the views heretofore expressed in the cases of *The Boskenna Bay*, 22 Fed. Rep. 662; *The Egypt*, 25 Fed. Rep. 324, 327, 328; and *The City of Lincoln*, 25 Fed. Rep. 835, 839. Such stipulations as these, though they expressly authorize the landing of the goods on the dock without notice, do not dispense, until reasonable notice of discharge, or a legal delivery, with the use of ordinary and reasonable care for the safety of the goods. Considering the great amount of goods that come consigned to order; the frequent impossibility that consignees should either know or be prepared to take immediate care of such goods as soon as landed; and that it may often happen that there is no one present, except the ship's company, that can possibly give any care to goods thus landed,—an express stipulation that all goods might be landed instantly, without notice and without regard to circumstances, and that the ship should not be required to take any further care of them whatever, when mere ordinary attention would preserve them from destruction, should be held to be an unreasonable and unconscionable exaction by the carrier, and void as against public policy. *Express Co. v. Caldwell*, 21 Wall. 264–266. In the management of the steam-ship lines that require stipulations like those in the present case, reasonable care of the goods landed is intended to be afforded, and is usually afforded, by various means, such as covered piers, locked gates, watchmen, and appliances for extinguishing fire. The actual intent is to give reasonable protection. The carriers seek to make this protection voluntary, in order to avoid legal liability in case of loss. But if the loss is by the ship's clear fault, that is negligence, and the stipulation does not avail her. All the just requirements and conveniences of shipping lines, having reference to the necessities of regularity, economy, and dispatch on their part, (*The Egypt*, 25 Fed. Rep. 320, 327,) will be protected under such stipulations as the present, although these stipulations are so limited by construction that the ship shall still be held legally bound to take such reasonable and ordinary care of the goods as may save them from destruction, and which no one but the ship is at the time in a situation to give.

In the case of *The Egypt* it was held, upon the facts, that there was no negligence or want of reasonable care, and the ship was therefore held not liable. In the present case, the facts show the contrary. The weather, as above stated, was so cold that it was not a proper time for the discharge, unless the consignees were present, and prepared to take the fruit away immediately. The consignees of these 200 cases were not present, and had no knowledge that the goods were on the *Surrey*. To discharge the fruit at such a time, without previously ascertaining whether the consignees were present and prepared

to remove it or not, was voluntarily exposing it to evident peril, which was itself an act of negligence.

The evidence shows, however, that the defense now set up is in the nature of an after-thought, and was not the ground of the ship's conduct at the time. The ship had in fact waited several days for favorable weather. When these goods were landed they were supposed to be represented by the consignees present. The marks upon these 200 cases were the initials of a prominent fruit dealer in New York, who, it was supposed, had arranged to remove them. But this was at best mere supposition. The Surrey had taken no copy of the bill of lading, and no bill of lading for these cases was presented to the ship before the discharge. In sailing without the ordinary maritime document for these goods, she was evidently in fault; and that fault contributed to her misapprehension in this case. Had she had a copy of the bill of lading, it would have been perceived that the goods were to be "transhipped for Canada;" and when the 200 cases were found remaining on the wharf in a cold day, after all the others had been removed, that circumstance would have indicated the probability that the consignee of these goods, which were intended for Canada and were deliverable to order, had had no notice of their arrival, and that the ship must therefore take care of them to prevent their speedy destruction.

It is urged that inasmuch as the custom-house inspectors, after the expiration of the 48-hour permit, were authorized to remove the goods at once to the general order store, and inasmuch as sections 2966 and 2969 of the Revised Statutes required the collector to take possession of merchandise discharged under general order, and to deposit the same in bonded warehouse, and that such goods "shall be kept with due and reasonable care, at the charge and risk of the owner," the goods in this case, from the moment they were landed, must be deemed in the possession of the inspector and under his care, and the vessel held exempt. If it had appeared that the inspector had taken the actual custody and control of these goods, a different case might be presented. But there is no evidence to that effect. The provisions cited from the Revised Statutes are designed for the benefit of the government, and not to exempt the ship from any responsibility. *The Egypt*, 25 Fed. Rep. 320, 333. Had any attempt on the part of the ship to take care of these goods been thwarted by the inspector's interference, the vessel might possibly have been excused. It is evident that the inspector exercised no charge or control over them, and they were frozen because the ship gave them no attention. So far as appears, there was nothing that prevented the ship from doing any suitable acts for the protection of the goods, either by taking them back into her hold, or by making suitable provision for them on the wharf, or by requesting the inspector to forward them at once to the warehouse, which upon request he would doubtless have done.

The ship's inattention to the fruit, it is pretty evident, arose less from design than from accident, through the common misunderstanding growing out of the transfer of the cases from the Penyghent to the Surrey. Under these circumstances, the question is on whom, under the contract, the loss must legally fall. For the reasons above stated I must hold the vessel responsible, as was done in the cases of *The Aline*, 19 Fed. Rep. 875; S. C. 25 Fed. Rep. 562; and the *The Boskenna Bay*, 22 Fed. Rep. 662.

A decree may be entered for the libelants, with costs.

---

CRAIG, Adm'r, v. CONTINENTAL INS. CO.

(Circuit Court, E. D. Michigan. February 8, 1886.)

1. SHIPPING—LIMITED LIABILITY ACT—WRECKED VESSEL.

The act limiting the liability of the owners of vessels applies to a vessel in a wrecked condition, though she be incapable of self propulsion, or of carrying a cargo.

2. SAME—KNOWLEDGE AND PRIVACY OF WRECKING MASTER OF INSURANCE COMPANY.

The "knowledge and privacy" of the wrecking master of an insurance company is not the knowledge and privacy of the corporation so far as to charge it with responsibility for his negligence beyond the value of the vessel.

On Motion for a New Trial.

The facts of this case were substantially as follows:

Plaintiff was the administrator of the estate of John Carbry, deceased, who, at the time of his death, was the engineer of a steam-pump on the barge Enterprise. On November 20, 1883, while upon a voyage from Sarnia to Lake Superior, the Enterprise went ashore upon Green island, in the northern part of Lake Huron. While in that condition she was abandoned to her underwriters, of which defendant was one. These underwriters were represented by Crosby & Dimock, general insurance agents at Buffalo. Upon receiving notice of the loss, Crosby & Dimock sent word to Capt. Rardon, their wrecking master, to organize an expedition and go to her relief. Rardon was what is called a marine inspector of four insurance companies, represented by Crosby & Dimock. Among his other duties was that of rescuing wrecked vessels and getting them to a port of safety. He carried a card, upon the back of which were the printed names of four insurance companies known as the "Big Four," one of which was the Continental. The face of this card contained his name and the words "Marine Inspector." Upon receiving these instructions he hired the tug Balize and certain steam-pumps, and went to Green island. Upon arriving there, he found the Enterprise had been lying 10 or 12 days upon the beach, got her off without great difficulty, and started to take her to Detroit. John Carbry, the plaintiff's intestate, was the engineer of the steam-pump, and in the immediate employ of the owner of the pump. About half way down the lake, and off Pointe Aux Barques, the Enterprise suddenly filled, and sank with all on board.

The plaintiff claimed that Rardon was negligent in attempting to cross the lake at this season of the year, without having made a more

thorough examination of the vessel's condition before setting out. He recovered a verdict for \$8,000, and the defendant moved for a new trial.

*F. H. Canfield*, for the motion.

*Don M. Dickinson*, for plaintiff.

BROWN, J. The most important question in this case, and one which goes to the entire merits of the plaintiff's claim, arises upon the request of the defendant to charge that the limited liability act is a complete bar to the action. This act, which, so far as it is applicable to this case, is embodied in Rev. St. § 4283, declares that "the liability of the owner of any vessel, for any \* \* \* act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." It is conceded in this case that the *Enterprise* became the property of the defendant by virtue of the abandonment, and that she became a total loss at the time of the death of Carbury. If the act applies to this case, it follows that the liability of the defendant was extinguished by the sinking of the vessel. There is no doubt that when the loss is total this fact may be pleaded, and no proceedings under the statute are necessary. *The Scotland*, 105 U. S. 24.

It was suggested upon the argument that the statute did not apply to a vessel in the condition of the *Enterprise*; but this objection is without force. She was still a vessel, though seriously injured by the stranding, and was in a condition to do damage to other property. It certainly cannot be the law that the owner loses the protection of the act the moment his vessel goes ashore, and that he must abandon her then at the peril of waiving this defense.

It is further insisted, however, that the act does not apply, as the negligence was not without the privity or knowledge of the owner. This position assumes that the knowledge and privity of Rardon was that of the insurance company; in other words, that he stood in the position of owner to this vessel. Upon the trial of this case I felt very grave doubt as to the soundness of this proposition, but decided to give plaintiff the benefit of this doubt, that the question might be more carefully considered upon motion for a new trial. None of the reported cases are decisive. Few of them throw any light upon the point. It was held in *Walker v. Transportation Co.*, 3 Wal. 150, that the owners of the vessel were entitled to the benefit of the act, notwithstanding the negligence of their officers and crew; in other words, that the negligence of the owner must be a personal negligence; but the question who is the person whose negligence shall deprive a corporation owner of the benefit of the act was not considered. This ruling was followed in *The Whistler*, 2 Sawy. 348, and in *Chisholm v. Northern Transp. Co.*, 61 Barb. 363. Such is also the

ruling of the English courts. *Wilson v. Dickson*, 2 Barn. & Ald. 2-13; *The Warkworth*, 9 Prob. Div. 20. In *Lord v. Goodall*, 4 Sawy. 292, it was said that when the owner is a corporation, the privity or knowledge of the managing officers of the corporation must be regarded as the privity and knowledge of the corporation itself; citing *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, and *Hill Manuf'g Co. v. Providence, etc., S. S. Co.*, 113 Mass. 495, wherein it was said, in reference to this act, that "if the owners are a corporation, the president and directors are not merely the agents or servants, but the representatives, of the corporation, and the acts, intentions, and negligence of such officers are those of the corporation itself."

These appear to be the only cases in which the point is alluded to. If the question were whether Rardon was a fellow-servant of Carbry, in such sense as to make the corporation responsible to the plaintiff for his negligence, we should have no hesitation in saying, upon the authority of *Hough v. Railway Co.*, 100 U. S. 213, and *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, S. C. 5 Sup. Ct. Rep. 184, that he was not. But in this class of cases the question is not one of exemption, but of limitation of liability. The act does not contemplate that the owner shall be exempt from liability by reason of the negligence of his servants, but that his liability shall be limited to his interest in the vessel, unless his personal negligence shall have contributed to the loss. Rardon was not an officer of the corporation. He was not its general agent. He was the marine inspector or wrecking agent of four companies, of which the defendant was one. He was not even employed directly by the corporations, but by Crosby & Dimock, their general agents at Buffalo; and, so far as the record shows, neither the president nor the directors of these corporations had any knowledge of his appointment. His powers were no greater than those of the master of a vessel, whose authority to employ assistance when his ship is stranded is beyond dispute. If the owner had been an individual instead of a corporation, it would have seemed clearer that Rardon did not stand in his place, but the law applicable to the case would be the same. We are entirely clear, in our opinion, that the case is within the act, and that the judgment should be for the defendant.

The verdict will be set aside, and a new trial granted.



## FRIEDMAN and others v. ISRAEL and others.

*(Circuit Court, E. D. Louisiana. January 30, 1886.)*REMOVAL OF CAUSE—DIRECTING MARSHAL TO TAKE PROPERTY FROM SHERIFF.  
HELD UNDER ATTACHMENT ISSUED BY STATE COURT.

Where a case has been rightfully removed from a state court, and the sheriff holds property under an attachment issued by that court, and one of the issues of law is as to whether the property attached was legally attached, and what privileges and rights plaintiff may have to and in such property, the circuit court may issue an order directing the marshal to take the property from the sheriff, and hold it for the circuit court.

On Motion to Remand, and to Vacate Order to Marshal, etc.

*Jos. P. Hornor and F. W. Baker, for plaintiffs.*

*A. H. Leonard and Marks & Bruenn, for defendants.*

BOARMAN, J. This suit was begun in the state court, where writs of attachment were issued, and certain property was seized, and is now held by the sheriff. The defendants caused the case to be removed on the ground of different citizenship. The state court refused the order for removal. The transcript was filed in this court, and some days afterwards the defendants filed a petition showing that the transcript discloses the fact that the sheriff of Ascension parish had siezed certain property of the defendant, and now, notwithstanding the suit is removed to this court, pretends to hold the said property by virtue of said writs. The petitioner prayed for an order directing the marshal to take from the sheriff the said property, and hold the same for this court. That order was granted. Before this order was executed, the plaintiffs moved to remand the case, and obtained a rule to show cause why the order to the marshal should not be vacated. Both of these matters are now before the court.

The state court, under its general jurisdictional power, was authorized to try the case. This court has jurisdiction to try the suit as an original suit, or as a case removed to it because of the different citizenship of the suitors. The motion to remand being overruled, the question as to vacating the order must be considered from the conclusion that the suit is rightfully removed, and that this court has jurisdiction to try the case, and all of its issues and controversies, just as if it had gone on in the state court.

One of the issues of fact and law is as to whether the property attached was legally attached, and what privileges and rights the plaintiff may have to and in the said property. The life of a judgment lies in the power of the court to execute it, and it is essential to competent jurisdiction that the property in an attachment suit, whether in the state or federal courts, should be in the legal custody of the court; otherwise a judgment affecting the *res* in the case would be an idle formality.

It appears that many, if not all, the difficulties suggested by the counsel, resisting the allowance of the order, grew out of the fact that the state and federal courts look to different sovereignties for the source of their judicial powers. As a rule, these courts administer the same laws; the United States courts administering the laws of the states in which they may be sitting; but the latter courts, on all questions of jurisdiction to try a particular case, look to the constitution and laws of the United States, and must for themselves, and in view of the duties and responsibilities imposed on them by the law of their sovereign, consider and decide such questions. Of course, the circuit court has no appellate power over the courts of any states; but its power to try the case, after it is properly removed, carries with it the authority to issue such orders as are necessary to make its jurisdiction effectual for enforcing the supremacy of the constitution and laws of the United States. *Rosenthal v. Walker*, 111 U. S. 186; S. C. 4 Sup. Ct. Rep. 382; *Tarble's Case*, 13 Wall. 406; *Ableman v. Booth*, 21 How. 506; *Covell v. Heyman*, 111 U. S. 179; S. C. 4 Sup. Ct. Rep. 355.

It has been held that the United States courts to-day are vested with all the judicial power that congress, under the constitution, can grant to them, and the act of 1875 has been declared by the United States courts to be free from all questions as to its constitutionality. The authorities are uniform in holding that when the formalities prescribed in that act for the removal of a suit have been complied with, the suit, *eo instanti*, is removed to the circuit court. *Insurance Co. v. Dunn*, 19 Wall. 223. Logically, it must follow from the language of that act, as well as from the frequent interpretations the United States courts have been called on to give to that act, that a suit rightfully removed is all out of the state court, and that all of it—the record and *res*—is in the circuit court, and that the circuit court and its officers are then charged with the duty of exercising all the conservatory writs and processes necessary to maintain its jurisdiction, and make the judgment of the court, in relation to the parties and the *res*,—whatever the judgment may be,—effectual.

The counsel arguing the motion to vacate admits, for the sake of his argument, that the case is rightfully removed; but he contends that there is no power in this circuit court to cause the *res* to be brought here. In support of this proposition, he cites the following cases: *Chesapeake & O. R. Co. v. White*, 111 U. S. 134; S. C. 4 Sup. Ct. Rep. 353; *Covell v. Heyman*, 111 U. S. 176, 182, 184; S. C. 4 Sup. Ct. Rep. 355; *Taylor v. Carryl*, 20 How. 583; *Com. v. Roby*, 12 Pick. 506; *Krippendorf v. Hyde*, 110 U. S. 283; S. C. 4 Sup. Ct. Rep. 27. The opinions in the cases cited do not appear to have been based on a consideration of such facts as are shown in this case, and a careful reading of them does not impress us with the thought that the supreme court intended to say anything authoritatively as to what they would hold should a case involving such facts

as are in this case come before that court. The order asked for does not contemplate the taking of property by the United States court out of or away from the jurisdiction of the state court, nor will its execution bring about a conflict of jurisdiction. Such a condition, in fact or in law, could not come about unless the property now in the hands of the sheriff is in the possession of the law. If we believed the property held by him is now in the possession of the law, that it is held by the sheriff under an operative writ or under competent authority, we would go no further in this matter. The reading of the act of 1875 shows clear enough what its authors meant, and we must discharge our duty in accordance with its provisions.

In *Kern v. Huidekoper*, 103 U. S. 485, the court, having cited a number of cases, said:

"Those cases decide that property held by an officer of one court, by virtue of process issued in a cause pending therein, cannot be taken from his possession by the officer of another court of concurrent jurisdiction, upon process in another case pending in the latter court. But here there is but one case. It is brought in the state court. It falls within the terms of the act of congress for the removal of causes. When the prerequisites for removal have been performed, the paramount law of the land says that the case shall be removed, and the case and the *res* both go to federal court. \* \* \* When the removal is accomplished, the state court is left without any case, authority, or process by which it can retain the *res*. \* \* \* The suit, and the subject-matter of the suit, are both transferred to the federal court by the same act of removal, or, when a bond for the delivery of the property has been taken, as in this case, the bond, as the representative of the property, is transferred with the suit. There is no interference with the rightful jurisdiction of the state court, and no divesting from its possession of property which it has the right to retain."

Let it be accepted fully, that the suit in which the attachment was issued is no longer a suit pending in the state court, but that there is but one suit, and it is in this court, and the difficulties as to a conflict of jurisdiction cease to be serious. Under the operation of the act of 1875 there is but one suit, and that is now all in this court.

It can hardly be seriously disputed that, when a case is rightfully removed to this court, the circuit judge can do or should do all that the state judge can do or should do if the case had remained to the end in the state court, and it follows that the federal judge possesses all facilities and powers which the state court could have exercised to dissolve the attachment if wrongfully issued, or to maintain and fix, by judgment, all the rights of the parties in the removed suit. Otherwise the suit is not removed. This view cannot be enforced unless this court has the *res* in its possession.

Again, it is contended that the defendant, seeking relief against the refusal of the state court to allow the removal of his case, must look, on a writ of error, to the appellate power of the supreme court of the United States. Whether congress can or cannot give the circuit courts of the United States power to issue writs of injunction, writs of prohibition, or processes for contempt when the state court

goes on with the trial of the case, need not now be considered. It is enough to say that congress has not given to the United States courts such a power. But no such power is required to make effectual the order herein sought by defendant; and it does not follow because such writs cannot issue, that the *res* in the removal suit cannot be brought to this court, and subjected to its jurisdiction just as fully as it would have been had the suit been dismissed in the state court, and then filed in this court. The end can be attained without invoking the appellate power of the supreme court; and there is no reason why a method or process, not prohibited by law, should not be now adopted, by which the act of 1875 can be made to attain the purpose its authors had in view when it became the supreme law of the land. It seems that the purpose of the mover for the order might be effected by taking up the case from the state court, on writ of error, to the supreme court; but none of the cases cited, directly or indirectly, seem to forbid the issuance of the order prayed for. If the defendant, as has been frequently held, need not stay longer or appear at all in the state court after the case is rightfully removed, why should he, in seeking for relief from the refusal of the state court to allow his suit to be removed, be limited to an effort to have the error of the state court corrected by the United States supreme court? If there was no jurisdiction in the state when the petition and bond were filed, why should the defendant go to the supreme court to correct an error committed by the state court after that court had lost its jurisdictional power to do anything in the case? By the paramount law of the land, the state court is directed, when certain formalities have been complied with, to give up to the United States court all the jurisdiction it had when the suit was removed. By operation of the supreme law, the state court is shorn of its powers to do anything further in the case, and not a vestige of the suit, or its subject-matter, rightfully remains in the state court. *Kern v. Huid-ekoper*, 103 U. S. 485; *Chesapeake & O. R. Co. v. White*, 111 U. S. 134; S. C. 4 Sup. Ct. Rep. 353; *Insurance Co. v. Dunn*, 19 Wall. 223. True, the state court has the power, whatever may be the decision of this court, physically to go on now and try the case; but its judicial power to continue its possession of the *res*, through the hands of its sheriff, is at an end, and his possession is not the possession of the law. The writ under which he seized the *res* is dead, and in his hands it is a shadow, and he cannot interpose it between himself, as an officer of the state court, and the marshal, when he demands the property. *Insurance Co. v. Morse*, 20 Wall. 445; *Railroad Co. v. Mississippi*, 102 U. S. 141.

This court's views may not be in accord with the opinion that the supreme court may announce should this case go up; but its decision, in the nature of things, must be the law for the case until the appellate court holds differently. For the purpose of passing upon the rule now being tried, this court has the fullest jurisdiction to say that

the suit is or it is not rightfully here, and all we have said is based on the opinion that the suit is rightfully removed. If it is rightfully removed, the force of what we have said cannot be denied. *Bank of U. S. v. Halstead*, 10 Wheat. 51; *The St. Lawrence*, 1 Black, 522.

This court cannot try the case, and dispose of the *res*, until it is in possession of the law which gives this court jurisdiction to try the case. The state court cannot try the case, because it is now without "any case, authority, or process by which it can retain possession of the *res*." Again, we say that this court is not interfering with or attempting to take a thing which is in the possession of the state court. The thing we direct the marshal to take is not in the possession of the law, because the writ under which the sheriff took possession of the property is now, under the provisions of the act of 1875, without effect in law. The writ cannot now protect him, in withholding the property from the demands of the marshal, to any greater extent than it would if the suit was dismissed, and the defendant should make a demand for the property.

The motion to remand is denied, and the rule to vacate the order to marshal is refused.

### YOUNG v. TOWNSHIP OF CLARENDON, impleaded, etc.

(Circuit Court, E. D. Michigan. February 15, 1886.)

#### 1. MUNICIPAL CORPORATIONS—BOND ISSUED TO CONSOLIDATED RAILROAD COMPANIES—ESTOPPEL.

When a municipality contracts with and issues its bonds to a railroad company formed by the consolidation of two other companies, it is estopped to question the validity of the consolidation.

#### 2. SAME—VOTE OF TOWNSHIP TO ISSUE BONDS—STATUTE UNCONSTITUTIONAL—SUBSEQUENT DECISION OF SUPREME COURT—RIGHTS OF CREDITORS OF RAILROAD.

A township, having voted to aid the construction of a certain railroad, issued its bonds for that purpose, and deposited them in escrow with the state treasurer to await the certificate of the governor of the completion of the road. While the road was in progress, the law under which the bonds were issued was declared to be unconstitutional, and the bonds were returned by the state treasurer to the township. The company went on and completed the road. Subsequently the bonds were declared by the supreme court of the United States to have been rightfully issued, and a judgment creditor of the road filed his bill to obtain the benefit of them. *Held*, that the surrender of the bonds by the state treasurer, and their retention by the township, was a conversion which entitled the company to bring immediate suit, and that the bill, not having been filed until 13 years after the bonds were surrendered, must be dismissed.

#### On Demurrer to Bill in Equity.

This was a bill filed in 1885 by a judgment creditor of the Michigan Air Line Railroad Company to realize for his own benefit the amount of certain bonds, issued by the defendant township under the railroad aid law of this state, which had been deposited with the state treasurer, and were held by him for the benefit of the road, until the

law was declared unconstitutional, and were then returned to the township authorities. The bill set up a judgment of this court in favor of the plaintiff against the railroad company for \$355,865.24 for the construction of a portion of the road, the issue and return of an execution unsatisfied, and the non-payment of the judgment. The bill further averred the defendant railroad to be a corporation organized on the twenty-eighth of August, 1868, by a consolidation of two companies, one organized under the law of Michigan, and the other under that of Indiana; that on the eighth of October, 1870, this consolidated road was again consolidated with the St. Joseph Valley Railroad Company; still, however, retaining its name of the Michigan Air Line Railroad; that on the twenty-first day of June, 1869, the electors of the defendant township voted to pledge the aid of the township to the company by a loan of its bonds in the sum of \$10,000, upon certain terms and conditions, provided the road should be constructed through such township, and would pay a certain proportion of its dividends in extinguishment of the interest upon the bonds and a certain other proportion to apply upon the principal. Bonds were subsequently issued, and in July, 1869, were delivered to the state treasurer to await the certificate of the governor of the completion of the road as required and authorized in such cases. The agreement required by the resolutions of the township was executed by the railroad company. The road was in process of construction, when on May 26, 1870, the supreme court of the state declared the law under which the bonds were issued to be unconstitutional. Notwithstanding this decision, the company went on, and completed the road, in full compliance with the conditions of the pledge, and applied to the governor of the state for his certificate that it had complied with the provisions of the act, and was entitled to the bonds. The governor declined to issue his certificate, giving as his sole reason for refusing that the law had been declared unconstitutional. The bill further averred that in May, 1872, the township, without the knowledge of the railroad, and in fraud of its rights, induced the treasurer to surrender to it the bonds and coupons which the township has since retained; that the railroad company has never made or paid any dividends; that the bonds became, in justice and equity, the property of the company, and the township became bound upon the same, according to their tenor and effect; and that the plaintiff is entitled to the amount of such bonds and coupons, with interest thereon, to be applied in payment of his judgment against the railroad company. To this bill the defendant township demurred, upon the grounds set forth and discussed in the opinion.

*Conely & Lucking*, for plaintiff.

*Boudeman, Marston & Gibson*, for defendant.

**BROWN, J.** The first and second grounds of the demurrer, which may be considered together, are based upon the theory that there is

no such sufficient averment of a consolidation of the two Grand Trunk Railways of Michigan and Northern Indiana. It is not alleged that the legislature of Indiana ever authorized the consolidation, nor that the directors of the two companies entered into an agreement to consolidate, nor that a stockholders' meeting was called to sanction such an agreement, nor that such an agreement was filed with the secretary of state as required by law. Doubtless, the legislature of this state could not alone authorize this consolidation. A legal consolidation of two roads in different states can only be had by the concurring act of the proper authorities of both. So, too, if the plaintiff derived his right to file this bill by virtue of the consolidation, it would perhaps be necessary to set forth in detail the successive steps to a legal consolidation. *Peninsular Ry. Co. v. Tharp*, 28 Mich. 505; *Rodgers v. Wells*, 44 Mich. 411; S. C. 6 N. W. Rep. 860. But the bill avers this consolidation to have been effected on the twenty-eighth of August, 1868; the resolution to aid the company in the construction of its road to have been adopted in June, 1869; and the bonds to have been issued in January, 1870. In other words, the township contracted and dealt with the consolidated company, and is therefore estopped to question the validity of its organization. Field, Corp. § 385.

Putting aside all the other technical objections to the bill, any of which, if valid, may be readily surmounted by an amendment, we proceed to the consideration of the merits of the case. The questions presented, though involving directly or indirectly some millions of dollars, require no elaborate discussion. The object of the bill is to obtain the benefit of certain bonds issued by the defendant township, in aid of the Michigan Air Line Railroad Company, and deposited with the state treasurer, to await the certificate of the governor of the completion of the road. Before the road was built the law under which the bonds were issued was decided to be unconstitutional. *People v. Salem*, 20 Mich. 452, and the bonds were returned to the township and canceled. Nevertheless, the company proceeded to complete the road, and earned the right to the bonds, upon the theory adopted by the supreme court of the United States that the law was constitutional. *Township of Pine Grove v. Talcott*, 19 Wall. 666; *Taylor v. Ypsilanti*, 105 U. S. 60. Had this court been one of general jurisdiction, with power to issue original writs of *mandamus*, we are inclined to think that such a writ might have been awarded upon the application of the present plaintiff, if made before the bonds were surrendered by the state treasurer. It is possible, too, that a bill for a mandatory injunction might have been sustained in this court for the same purpose, but the bonds, having been returned to the township, and 14 years having passed since the completion of the road, and the right to the bonds had accrued, it is manifestly too late to institute any proceedings upon the theory that the plaintiff is entitled to the bonds themselves, or to their value, at the time they should

have been delivered to the company. In this connection, we take it for granted that the plaintiff stands in no better condition to enforce the obligation of the township (except by reason of his non-resident citizenship) than the company would have had had proceedings been instituted in its name.

Recognizing the insuperable difficulty of maintaining a bill in this aspect, plaintiff seeks, by the present bill, to treat the bonds as if they had been actually delivered to the company, and to sue upon them as lost or destroyed instruments. In the twenty-fifth paragraph of his bill, he prays that the court will adjudge and declare that the company earned these bonds, and was entitled thereto, and that the township is equitably indebted to the company in the whole amount of the bonds and coupons, with interest thereon; that the court will ascertain the amount equitably due from the town, and decree that it pay such amount to the plaintiff towards the satisfaction of his judgment. The defendant takes the position that there was never any contract between the township and the railroad company; that the act of the township in voting to make the loan was its separate and independent act, and the building of the railroad a separate and independent act of the company; that there was no consideration or mutual promise that in any way obligated the township to make the loan; and that the only mode by which such contract relation could be created was by the actual delivery of the bonds to the company. We cannot assent to this proposition. We think that the pledge voted by the township, the agreement executed by the railroad company in compliance with the second condition of this pledge, as set forth in paragraph 17 of the bill, and the delivery of the bonds to the state treasurer, amounted to the consummation of a contract between the township and the company, and that the construction of the road entitled the company to the bonds. We think we are justified in holding this to be a contract, by the language of the opinion in *Taylor v. Ypsilanti*, 105 U. S. 60, 72, and *New Buffalo v. Iron Co.*, Id. 73.

The cases cited by the defendant are not controlling in this particular. In the case of *Aspinwall v. Commissioners of Daviess Co.*, 22 How. 364, stock was subscribed and bonds issued by the county commissioners, in compliance with the vote of the county held on the first of March, 1849, but before the subscription was actually made the state adopted a new constitution which went into effect November 1, 1851, one of the articles of which prohibited such subscriptions. In 1852 the county commissioners subscribed for stock, and issued its bonds, and it was held that a mere vote to subscribe did not of itself form such a contract as would be protected by the constitution of the United States, and that until the subscription was actually made the contract was unexecuted. It is readily distinguished from the present case in the fact that these bonds were actually issued, and placed in escrow in the hands of the state treasurer



to await the completion of the road, and that the company went on and built the road upon the faith of the bonds. The township had done the last thing it was required to do by its pledge. Practically the same position was taken by the supreme court of Illinois in the case of *People v. County of Tazewell*, 22 Ill. 147, in which it was held that, until the county or city had subscribed, there was no privity between the road and county or city. "It is the contract of subscription which compels the subscriber for stock to pay his money, and the company to issue to him his shares of their stock. Until the county subscribes for shares of their stock the company held no obligation upon the county, and cannot, by tendering shares of stock, compel them to subscribe or issue bonds, nor have they any power to compel the road to issue to them shares of their stock. Until the subscription is made, it is entirely at the option of the road whether they will permit such a subscription. Before the subscription is made no obligation exists between the parties. Nor can the vote be treated as an agreement between the county and the road, beyond what the law has peremptorily required to be performed. When the vote was taken, and resulted in favor of the subscription, it only amounted to a delegation of power to the supervisors to make the contract of subscription, as the law then authorized them to do."

It is too clear for argument that this language has no application to the case under consideration. In the case of *Falconer v. Buffalo, etc., R. Co.* 7 Hun, 499, it was held, in the same terms, that the consent of a majority of the tax-payers of a town that the bonds of the town might be issued in aid of the construction of a railroad, gave no right to the company that a court of law or equity would enforce against the town, because the company was not bound to receive the bonds. It could not compel the persons appointed to issue the bonds, because they owed no duty, at that stage of the case, to the company. Here, too, the transaction was wholly incomplete on the part of the town. The present case would have been similar if the township had stopped with the bare pledge, and never issued the bonds. In *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 695, the bonds were voted in November, 1869, provided the company would run its road through the town. On the twentieth of June, 1870, the company gave notice of its acceptance of the donation, and on July 2, 1870, a new constitution was adopted annulling the power of any municipality to make donations or loan its credit to railroad companies. Notwithstanding this, in October, 1871, the bonds were issued by the supervisor and town clerk. It was held that, as the town had no authority to make a contract to give, and the acceptance of the company was an undertaking to do nothing which it was not bound to do, no valid contract arose from such offer and acceptance. The opinion was placed upon the ground that the donation was not permitted to be made until after the completion of the location and construction of the road through the town; that the popular vote was

not itself a donation, and that the town was not authorized to make it until the road was located and constructed. Before that time, and before any attempt at a donation or appropriation was made, the authority was withdrawn. The town had authority to make a donation, but it had no authority to make a contract to give, and, as the donation was made after the constitution took effect, it was very naturally held to be void. Here the act expressly authorizes the bonds to be issued before the road was completed, and this act, as we are bound to hold, was never repealed or annulled to the disturbance of vested rights.

It is true, there was no delivery of these bonds to the company, but they were executed and delivered in escrow to the state treasurer, and upon the performance of the condition upon which they were deposited the title to them vested in the company, notwithstanding they were not actually delivered. *Couch v. Meeker*, 2 Conn. 302; *Taylor v. Thomas*, 13 Kan. 217; *Jackson v. Catlin*, 2 Johns. 248; 1 Washb. Real Prop. The governor's certificate was merely a formal act,—the proper evidence upon which the state treasurer was empowered to deliver the bonds to the company; but in no sense a condition precedent to the company's rights to them when withheld for any other reason than the failure to complete the road. Had this bill been promptly filed, we see no escape from the conclusion that the plaintiff would have been entitled to a decree for the value of the bonds; but, in the view we have taken of the case, the surrender of the bonds by the state treasurer, and their receipt by the township, was a conversion, and entitled the plaintiff to bring immediate suit for their value. *Knight v. Legh*, 4 Bing. 589; *Outhouse v. Outhouse*, 13 Hun, 130. Having the right to sue he was bound to exercise such right within the time allowed by law for that purpose. He might also waive the tort, and bring *assumpsit* for their value; but where, as in this case, the right of action attaches immediately, we do not think he can wait until the maturity of the bonds, and sue upon them. In neither of the two cases above cited from Connecticut and Kansas, where the right to sue upon the instrument was sustained, did the question of conversion arise. In *Couch v. Meeker*, 2 Conn. 302, the note was put as an escrow into the hands of a third person, subject to the performance of a certain condition. Plaintiff brought suit upon the note, and averred that the condition had been performed, and the depositary brought the note into court, and plaintiff was held entitled to recover. In *Taylor v. Thomas*, 13 Kan. 217, it does not appear in whose hands the note was at the time the suit was begun, but there was no evidence of conversion. It is true that the case of *Lamb v. Clark*, 5 Pick. 193, is an apparent authority for the proposition that an action of *assumpsit* may be maintained notwithstanding the time for bringing an action of trover may be barred by the statute. In this case the defendant fraudulently procured of the plaintiff's intestate a quantity of notes and securities.

The transaction took place more than six years before the commencement of suit. It appeared that the notes were paid to the defendant by the makers thereof at various times, some more and some less than six years before the suit was begun. The defendant contended that if there was fraud in the transaction it was barred by the statute of limitations, but the court held that, notwithstanding the notes were obtained by fraud, the plaintiff might recover all such moneys as were received by the defendant from the makers of the notes within six years before the commencement of the action; holding substantially that the defendant could not take advantage of his own fraud by pleading the statute of limitations. "There are cases," says the court, "where the injured party may have his election of remedies; as, where there has been a tortious taking of his property, he may bring trespass or trover, or he may waive both and bring *assumpsit* for the proceeds when it shall have been converted into money. And if he chooses the latter mode of redress, the tort-feasor cannot, we think, allege his own wrong, for the purpose of carrying back the injury to the time which will let in the statute of limitations." But the rule enforced in this case, that no one shall take advantage of his own wrong, has no just application to a technical wrong of the kind set forth in this bill. Under the law, as construed by the supreme court of this state, the secretary of state could do no otherwise than return the bonds to the township. Probably he might have been compelled to do so by *mandamus*, and the township officers were guilty of no actual fraud or wrong in failing to recognize them until compelled to do so. To say that, under such circumstances, they cannot plead that the statute of limitations has run against the tort, would be a manifest perversion of the maxim.

The position of the plaintiff in this suit assumes that the company was bound to wait until the maturity of the bonds before suit could be brought upon them. But we cannot assent to this proposition. The bonds were issued to aid the construction of the road. It is safe to assume that the company did not desire them as an investment, but to raise money, by their negotiation and sale, for the payment of their current expenses. For this purpose they would be entirely useless unless the company could obtain possession of them. To this possession it was entitled, and the withholding of it was a conversion, and from this time if the statutes of limitation did not begin to run at law, the duty of a party seeking equitable relief, to act promptly, attached. This view is not only the more just and equitable as respects the plaintiff, but the proposition for which he now contends would operate with extreme hardship upon the defendant township. These bonds, amounting in all to \$10,000, were made to mature in sums of \$1,000 each year, from 1871 to 1880, with 10 per cent. interest. This amount distributed, as was contemplated, over a period of 10 years, might be easily raised by taxation, while a decree for the entire amount, rendered six years after the longest bond had ma-

tured, would fall with crushing weight upon the township, and upon individuals who had purchased or dealt with property there, upon the theory that the bonds were no longer valid obligations. As no interest had ever been paid upon these bonds, there was nothing to apprise the town that they would ever be enforced, until this bill was filed. Upon the whole, we think, the delay in this case is fatal.

A decree will be entered, dismissing the bill, with costs.

---

FREUND and others v. YAEGERMAN and others.<sup>1</sup>

(Circuit Court, E. D. Missouri. February 23 and March 2, 1884.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—MORTGAGE OF ENTIRE ASSETS BY INSOLVENT DEBTOR—REV. ST. MO. § 1854.

Where an insolvent debtor mortgaged all of his property not exempt from execution, to secure the payment of an antecedent debt due one of his creditors, and thereafter, on the same day, made a general assignment for the benefit of all his creditors, *held*, (1) that under the Missouri statutes the mortgage is void; (2) that the mortgagee is entitled to share equally with other creditors under the general assignment; (3) that the assignee of the state court should close out the estate.<sup>2</sup>

2. SAME—JURISDICTION—FUND IN POSSESSION OF STATE TRIBUNAL.

*Semble*, that, where a fund is in the possession of a state tribunal, this court will not interfere with it.

In Equity. Creditors' bill.

When the mortgage in question herein was executed by Mr. Yaegerman, he was insolvent. It covered all of his property except a small amount exempt from execution. The first of the following opinions was delivered February 23, 1886.

*A. Binswanger and E. Smith*, for complainants.

*Robert W. Goode*, for Yaegerman.

TREAT, J., (*orally*.) The facts, as developed in this case, in a few words, are these: Mr. Yaegerman, having a business establishment, executed a mortgage for an antecedent debt to Miss Betsy Holts, which debt it is alleged had existed for some two or three years. That mortgage, from its terms, was inoperative; in that there were provisions which the law does not tolerate. It occurred to the attorneys of the parties, very properly, that the provisions of that mortgage might invalidate it; therefore it was thought a general assignment should be made under the state law. It was made. The assignee under the state law took possession. The bill was filed here for injunction. By agreement among the parties the assignee proceeded to sell said property. It was sold. The proceeds are in his hands.

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

<sup>2</sup> Respecting assignment for the benefit of creditors, see *Wooldridge v. Irving*, 23 Fed. Rep. 676, and note, 682-690; *Webb v. Armistead*, 26 Fed. Rep. 70, and note, 72-73.

True, he is made, by amendment, a party to the proceedings here; being primarily an officer of the state court, and subject to its rules. I apprehend that there is no conflict likely to arise in the matter, because the difficulty is with regard to this mortgage,—whether the funds that came through his hands shall be paid first to this mortgagee, or that the matter shall be treated as a general assignment. Now, under the repeated decisions made by this court, a transaction of this kind is nothing but a general assignment. Taking the two papers together, instead of separating them, which might be done, the mortgage and the assignment, simultaneous, should be treated as a general assignment for the benefit *pro rata* of the creditors. The result is that this court will decree that the said mortgage be declared void, and the mortgagee therein be remitted, as a general creditor, to share *pro rata* in the proceeds of the property now in the hands of the said assignee; the costs in this court to be charged against the fund in the hands of the assignee.

---

The following opinion was delivered March 2, 1886:

TREAT, J., (*orally*.) In this case of *Freund v. Yaegerman*, the court, some days ago, passed a decree, which was withheld, at the request of the parties, for further consideration. I have gone over all the authorities presented on either side, and a great many other authorities not presented in the briefs. The early Missouri cases were determined under an entirely different statute, where the right to prefer in an assignment was a statutory right. In the various courts of the country decisions have been made, under the respective statutes of those states, which throw very little light upon the question under consideration. The nearest cases, perhaps, other than those here, are the New Hampshire and Tennessee cases cited by Mr. Mills in a case decided a few days ago. The question involved in the matter now before the court has undergone adjudication in the federal courts, and never yet been decided expressly by the supreme court of the state. This court would follow the decision of the supreme court of the state if any had been made on the propositions involved. There is one case cited by the counsel for the defendants, by the supreme court, and a recent case by the court of appeals at Kansas City, which seem to come very near to the views he seeks to uphold. Neither of them reaches the point involved here. When the question was first presented in the United States circuit court for the Western district of Missouri, Judge KREKEL, with the concurrence of Judge McCRARY, laid down what he considered the true interpretation of the statute concerning the facts then involved. Subsequently a case arose here in which, sitting alone, I considered it my duty to follow the rulings of the circuit court judge. Subsequently Brother BREWER came on the bench. He did not like

those rulings, and so expressed himself, giving his reasons therefor, all of which have appeared in the Reports. Consequently the matter rested in that condition until Mr. Justice MILLER came on the circuit. The matter then was considered in its entirety, (under the views expressed by Brother BREWER,) whether he would not overrule those decisions of Judges KREKEL and McCARY. At Justice MILLER's instance, I sat with him in the hearing. The conclusion reached was substantially this: that under the statute of the state of Missouri concerning voluntary assignments, when property was disposed of in entirety or substantially,—that is, the entire property of the debtor, he being insolvent,—it fell within the provisions of the assignment law. The very purpose of the law was that no preference should be given. No matter by what name the end is sought to be effected, it is in violation of that statute. You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known, if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute. That was the opinion of Brother MILLER, with which I fully concurred.

The case before the court falls within that decision. Without discussing the question as to whether the mortgage in this case, executed the same day as the general assignment, was valid on its face or invalid, (and it appears it was invalid,) and admitting—and there is nothing here to show to the contrary—that the mortgagee was a creditor in perfect good faith, the proposition is to be determined whether a mortgage thus executed, conveying the entirety of the insolvent's estate, followed simultaneously, or a few minutes thereafter, by a general assignment, can operate to defeat that statute of Missouri which says that all creditors shall share *pro rata*. I have examined all the authorities named, together with additional authorities cited by the counsel for the defendants, and I still think that Justice MILLER's ruling, in which I fully concur, is the true interpretation of the Missouri statute.

*Mr. Goode.* The only thing left out in that ruling is that your honor will permit a motion for rehearing, which I would like to argue before Judge BREWER, with your honor, for the reason, as I understand, that you, as well as Judge BREWER, think that Judge McCARY, in laying down that doctrine, was wrong.

*Treat, J.* No, you mistake; I think he was right.

*Mr. Goode.* Judge BREWER thinks he was wrong, and has so expressed himself. Now, Judge BREWER, in his last decision, stated that he wished the United States supreme court, or, rather, our state supreme court, would authoritatively construe that statute. That wish has not been complied with yet. But in the case cited from the Kansas City court of appeals there was an authoritative construction of that statute satisfactory to myself, and I must concede, while

not binding on yourself or Judge BREWER, still, if Judge BREWER would consider that binding on him to that extent, as to the construction of the Missouri statute, your honor would defer to that ruling of Judge BREWER, and I would therefore ask as a favor—I can only consider it such—that I may be permitted to argue the motion before Judge BREWER.

*Treat, J.* It was my thought to suggest to the counsel that this hearing should be had before Judge BREWER, but you forced me to hear it, and I have had to decide it in the light of what must be considered the authoritative ruling in this circuit until something happens, which has not happened, in the way of a decision of the supreme court of the state, or Brother MILLER overrules himself. It does not become me to overrule Justice MILLER.

*Mr. Goode.* I wish, as Judge BREWER said in my hearing once, and as he has also said in the *Nordmeyer Case*, 25 Fed. Rep. 71, (reported and read by Mr. Smith,) that he wished the state supreme court would authoritatively construe the statute; indicating, by his expression and wish, his belief that they would construe it differently from Justice MILLER, and satisfy him that he was right in differing with that opinion. I wish, therefore, to show him the Kansas City court of appeal's decision, which has, for the first time in the history of any court in this state, construed section 354, and ask him if that is not sufficient authority, I have that confidence in Judge BREWER that he will consider it sufficient, and as he will be here within 15 days, there will be no harm in granting me that privilege.

*Treat, J.* I have no objection to your motion. You can file it under the rules. I will not hear the motion until he comes. There will be no great delay. There was a difficulty when this case was first presented, which suggested itself to the mind of the court, viz., that here was an officer of the state court, Mr. Carter, who was a general assignee, and, being an officer of the state court, was bound to comply with its provisions with regard to inventories, bonds, etc. To what extent would this court interfere therewith? Why not go into that court, and have the matters determined? Possibly, that court had taken a different view of the question from what this court had taken. But parties came here, and asked to get by a decree of this court what they were satisfied they could not get from a decree of the local court. That is the first difficulty. Of course, if they had a constitutional right to come here, this court must uphold their right jurisdictionally. Now, what should be done? The original bill, as it stood here, as I have read it, only asked that this mortgage might be decreed a general assignment under the statute. This technical difficulty arose: the fund and the jurisdiction, as of a general assignment, were in the state court. Then, by consent of parties, Mr. Carter, the assignee of that tribunal, was made a party defendant. That was done to avoid confusion, etc. He came in. Now, the theory of the bill was to declare the mortgage an assignment. Suppose, technically

speaking, the court had so done, what becomes of the general assignment made a few minutes subsequently? If that was a general assignment, you can see at once what confusion would arise with regard to the matter. There was no allusion made in the original bill to that assignment, as I remember it, for any ruling against it, because that assignment was in compliance with the terms of the state statute, for the benefit of creditors generally; but the trouble was in the mind of the plaintiff in this bill that this mortgage covered the property, and left in the assignee only a few dollars. It was to accomplish the end which it was supposed the statute was designed to effect, viz., that the entire estate should be distributed *pro rata* among all creditors; and, as is usual in these equity bills, we have a general prayer for relief,—consequently the form that I suggested. I declared the mortgage void. It is not from any fraud or anything of the kind. I simply establish the validity of plaintiff's demand, and permit the mortgagee to share equally with the others, and let the assignee of the state court close out the estate accordingly. That is the only way I could accomplish the end. Now, certainly it is desirable that Brother BREWER may go over this. Therefore I cheerfully allow you to file your motion for a rehearing. I may say this preliminary question troubled me a good deal at first. Now, there is what I may call, under the decisions of the supreme court, an elemental doctrine. Where a fund is in possession of any other tribunal, this court will not interfere with it, and that is the first thought I had in this matter,—whether this case did not fall under those rulings, and whether, on the face of the bill, if the facts had been stated fully, I would not dismiss it at once, and leave the tribunal that had the custody of the estate to determine it. There was the question never presented. I expected it to be raised by the defense, and I would then have said, "No; we will not interfere with the custody of an estate in the hands of another tribunal."

*Mr. Goode.* That shows our *bona fides*.

*Treat, J.* It is not a question of *bona fides*, but of comity. Of course, as far as the case discloses, your client Holts—not speaking of the other one—is a creditor to the extent of the amount stated, and the only question is, what is the law? So far as the bill discloses, there is no question as to the custody of the estate. Otherwise we would have unseemly conflicts between the state and the federal courts.



BLUE RIDGE CLAY & RETORT CO. v. FLOYD-JONES and others.<sup>1</sup>

(Circuit Court, C. D. Missouri. March 17, 1886.)

## EQUITY PRACTICE—FILING SPECIAL REPLICATION OUT OF TIME.

A replication due at the October rules not having been filed, defendants filed a motion to dismiss December 3d. A special replication was thereafter filed. *Held*, that the motion must be sustained.

In Equity. Motion to dismiss.

The motion to dismiss was filed December 3, 1885. A special replication was filed December 5, 1885.

*Fag & Hatch* and *Davis & Davis*, for complainant.

*George H. Shields* and *R. H. Floyd-Jones*, for defendants.

TREAT, J., (*orally*.) In the case of the *Blue Ridge Clay & Retort Co. v. Floyd-Jones* there is a motion to dismiss. There are irregularities of practice in this case from the beginning to the end. First, under the statute of the state, where, instead of by regular proceedings to foreclose, the party chooses to proceed under the powers given in the deed of trust to secure a debt, and does so proceed, the right of redemption exists for a year, but it exists on the terms prescribed by the statute, to-wit, the payment of the debt secured by the deed of trust, the costs, etc., that have been incurred. Now, four days before the expiration of the year after the sale a bill was filed in this court, the plaintiff being a New York corporation. In the bill there is no averment anywhere that the amount of the debt, costs, etc., has been tendered as required by the statute, or is intended to be, nor that the amount is now brought into court to be paid. There is an utter failure on the face of the bill to comply with the terms of the statute.

The party respondent has answered elaborately. The replication was due at the October rules. The regulations prescribed by the supreme court concerning equity matters have, I may say, almost the force of statutes in this court. Had application been made, possibly an extension of time might have been granted as to the replication. No application was made. After the motion was filed to dismiss for non-compliance with the rules, the party came in and filed a replication, which is a paper wholly unknown to equity practice, under rule 45. I suppose his mind was resting on the practice which prevails in the state courts. Under rule 66 the party was entitled to have this suit dismissed, as of course, unless the party, for cause shown, applied to the court to escape the consequences of his negligence. No such application was ever made. He filed a paper which is not an equity replication. Now, what shall be done? The motion

<sup>1</sup>Reported by Benj. F. Rex, Esq., of the St. Louis bar.  
v.26F.no.11—52

here is grantable, as of course, no application having been made on the other side, for cause shown, with respect to it. I have gone through all the papers in the case, as if the rights of the parties were here to be determined on a controversy which they sought to present. The court must enforce the rule of the supreme court in regard to this matter.

The motion to dismiss will be sustained, (without prejudice).

---

SCHUMACHER and another v. SCHWENCKE and others.

(Circuit Court, S. D. New York. March 23, 1886.)

TRADE-MARK—JURISDICTION OF CIRCUIT COURT—INFRINGEMENT NOT IN FOREIGN COMMERCE OR TRADE WITH INDIAN TRIBES.

The circuit court has no jurisdiction of a suit for the infringement of a trade-mark by a citizen of the same state as the complainant unless such infringement consists in using the trade-mark by the defendant upon goods intended to be transported to a foreign country, or used in lawful commercial intercourse with an Indian tribe.

In Equity.

Antonio Knauth, for orator.

Louis C. Raegener, for defendants.

WHEELER, J. This suit is brought to restrain infringement of trade-mark No. 9,737, registered October 17, 1882, and consisting of the words "Henry Lee" appropriated for use upon prints, labels, show-cards, calendars, printed cards, and tags. The parties appear from the bill to be all of them citizens of the state of New York. It is alleged that the orator, a corporation, has used this trade-mark on labels in domestic commerce, inter-state commerce, and commerce with foreign countries, and that the defendants have in New York applied it to labels not made or sold by or for the orator, and sold the same, and have sold the same in other states of the United States, "and have sold the same in foreign countries." These are all the allegations there are as to the use of the trade-mark by the defendants in foreign commerce, and all such sales and use are denied by the defendants. There is nothing in the case about use of it in commerce with any Indian tribe. The courts of the United States have no jurisdiction of suits like this unless it is given by statute under which the trade-mark was registered. *Trade-mark Cases*, 100 U. S. 82; *Luyties v. Hollender*, 21 Fed. Rep. 281; 21 St. at Large, 504, c. 138, § 11. That statute limits the jurisdiction under it so that it is not conferred "unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe." It seems to be understood by

the orator's counsel that jurisdiction is given if the trade-mark is used by the orator in foreign commerce, or upon goods intended to be transported to a foreign country. But the authority of congress over this subject arises from the power to regulate commerce, and does not extend to the protection of trade-marks within a state. *Trade-mark Cases*, 100 U. S. 82. The orator may have a valid trade-mark, and an exclusive right to its use in New York; but, if so, his rights in that respect do not rest upon the laws of the United States. The registration under the statute only confers a right to it in foreign commerce, and a claim for infringement, or to be protected against infringement, cannot arise under the constitution or laws of the United States unless the infringement is upon the right to use it in foreign commerce, which can only be by using the trade-mark without right in such commerce. The jurisdiction is not conferred at all by express words of the statute; but only by providing a mode of acquiring a right, a suit for the invasion of which would arise under the laws of the United States within the act of 1875. The clause quoted from is restrictive of that jurisdiction. The defendants do not infringe upon any right resting upon the laws of the United States unless they use the trade-mark in foreign commerce, and jurisdiction of a suit for such infringement is not left in the courts of the United States unless such infringement consists in using the trade-mark by the defendants upon goods intended to be transported to a foreign country. The bill falls short of alleging such use; and this court appears to be without jurisdiction to restrain the use which is alleged.

Motion for preliminary injunction dismissed.

---

WHITTEMORE v. AMOSKEAG NAT. BANK and others.

(Circuit Court, D. New Hampshire. December 3, 1885.)

CORPORATION—ACTION BY STOCKHOLDERS—COLLUSION—EQUITY RULE *vs.*

Bill in action by stockholder against a national bank *held* demurrable, because it contained no allegation that plaintiff was a shareholder at the time of the transaction complained of, or that his share had since devolved on him by operation of law, and that the suit was not a collusive one to confer jurisdiction on the circuit court, and because plaintiff failed to allege any efforts made to secure such action as he desired on the part of the officers of the corporation, and the cause of his failure to obtain such action as required by equity rule 94.

In Equity.

H. G. Wood, for complainant.

Livermore & Fish, for respondents.

COLT, J. There being no allegation in this bill that the plaintiff was a shareholder at the time of the transaction of which he com-

plains, or that his share has devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and the plaintiff failing to set forth in his bill any efforts made to secure such action as he desires on the part of the managing directors or trustees, and the causes of his failure to obtain such action, as prescribed by equity rule 94 of the supreme court, we think it clear that the demurrer to the bill must be sustained. We fail to see the force of the plaintiff's objection that rule 94 does not apply to this case, either by reason of the character of the allegations contained in his bill, or by reason of the fact that, as he contends, the rule does not apply to a stockholder of a national bank in consequence of the language contained in section 5139 of the Revised Statutes. Rule 94 was adopted by the supreme court after careful consideration of the whole subject to which it relates. It prescribes, in a certain class of cases, a mode of procedure, and it makes no exception to the class of cases which are governed by it. With the rule before us, we find no valid ground upon which to sustain the plaintiff's position. Demurrer sustained.

---

CHICAGO & P. R. Co. and others v. THIRD NAT. BANK OF CHICAGO.

(Circuit Court, N. D. Illinois. February 15, 1886.)

RAILROAD — CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY — LIABILITY ON JUDGMENT AGAINST CHICAGO & PACIFIC RAILROAD COMPANY.

Judgment obtained by the Third National Bank of Chicago *held* a lien on the Chicago & Pacific Railroad, leased to the Chicago, Milwaukee & St. Paul Railway Company, for which, under the terms of its lease, it was liable, and a decree passed, requiring it to pay into court, within 30 days, a sufficient sum to satisfy the demand of the bank.

In Equity.

*Edwin Walker*, for the railroad company.

*Lyman & Jackson* and *John H. Thompson*, for defendant.

GRESHAM, J. The Chicago & Pacific Railroad Company was organized in 1865, to build a railroad from Chicago to the Mississippi river. In the prosecution of its enterprise the company contracted debts amounting to over \$2,000,000. To raise money to pay this indebtedness, and to complete and equip its road, the company, on the first day of October, 1872, executed a trust deed or mortgage, embracing its property of every character and description, to secure an issue of \$3,000,000 bonds, \$2,000,000 of which were sold or delivered to creditors as collateral security. Early in 1876, the company had built its road from Chicago to Byron, a distance of 89 miles. Suit

was commenced in this court in May, 1876, to foreclose the mortgage, and in May, 1879, the property and franchises were sold, subject to redemption, under a decree previously entered, to John I. Blair and others, for \$916,100. On the second day of April, 1880, the company, with the approval of its stockholders, leased its railway and other property, including its franchises, to the Chicago, Milwaukee & St. Paul Railway Company for 999 years. In addition to the foregoing facts, the lease contained the following recitals:

"Whereas, certain other parties to whom the said party of the second part (the Chicago & Pacific) was so as aforesaid indebted, have prosecuted their several demands in the superior and circuit courts of Cook county and other courts of the state of Illinois, and have procured divers judgments thereon which now remain unpaid and unsatisfied of record, and are a lien upon the property of the said party of the first part, and other of said demands still remain unliquidated; and whereas, the said party of the second part, at the request of the said party of the first part, (the Chicago, Milwaukee & St. Paul Company,) now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale, and to protect said property from all the aforesaid valid judgment liens, and also to extend and construct the road of said party of the first part to the Mississippi river; also to secure all proper and necessary terminal facilities and depots and grounds along the line; also to relay that part of the road already constructed, with steel rails, and to fully equip said road with all necessary rolling stock, so as to make the entire line a first-class railroad in all respects,—the entire or aggregate cost of which is estimated at three millions of dollars, for which said sum the parties hereto, by their proper officers, propose to execute their joint and several bonds of one thousand dollars each, bearing date the second day of April, A. D. 1880, and becoming due and payable on the first day of January, A. D. 1910, bearing interest at six per cent. per annum, payable semi-annually, viz., on the first days of January and July of each year, at the office or agency of the party of the second part, in the city of New York, which said bonds are to be secured by a trust deed or mortgage, of even date with said bonds, of all the railroad franchises and other property of the party of the first part, to the Farmers' Loan & Trust Company, of the city of New York; and whereas, the said party of the second part, at the like request of the party of the first part, proposes to take up, pay, cancel, and satisfy all of said bonds at their maturity, and to meet, pay, and satisfy all the accruing interest on said bonds as the same shall become due and payable according to the tenor thereof, and forever save the said party of the first part harmless therefrom, and also to pay all taxes, charges, or assessments imposed or assessed, or which may be hereafter imposed or assessed, upon the property or premises of the party of the first part."

Concurrently with the execution of this lease, the two companies executed a joint trust deed upon all the property of the Chicago & Pacific Company to secure the payment of 3,000 \$1,000 6 per cent. bonds, all of which, after being duly executed by both companies, the Milwaukee Company received. The receiver, who had been in possession since the foreclosure suit was commenced, was discharged on June 28, 1880, at which time the Milwaukee Company entered into possession of all the leased property, and has ever since continued in possession. This company redeemed the property from

the foreclosure sale, extended the road to the Mississippi river at Savannah, where it constructed a bridge across the river, secured all necessary terminal facilities, depots and grounds along the line, re-laid the road between Chicago and Byron with steel rails, and fully equipped the road with necessary rolling stock, and has ever since operated it as part of its line between Chicago and Omaha, as a first-class railroad. It did not, however, keep that part of its agreement which required it to protect the leased property from all existing valid judgment liens. The money that was paid to redeem from the sale under the decree of foreclosure was accepted by the purchasers.

On the ninth of March, 1876, Horace A. W. Tabor recovered a judgment in this court against the Chicago & Pacific Company for \$3,499.73, and on the third of April, 1882, the Third National Bank of Chicago recovered a judgment in the same court, against the same defendant and others, for \$36,165.36; the latter judgment being for money lent to the last-named company before the execution of the lease. On June 25, 1881, the marshal sold the Chicago & Pacific road to Albert Keep for \$4,822, on an execution to satisfy the Tabor judgment, and delivered to the purchaser a certificate of sale. Keep, who was president of the Chicago & Northwestern Railroad Company at the time of the purchase, sold and assigned this certificate to Alexander Mitchell, who then was and still is president of the Milwaukee Company. On the twenty-fifth of September, 1882, the Third National Bank, as a judgment creditor of the Chicago & Pacific Company paid to the marshal \$5,304.20 to redeem from the last-named sale, and Mitchell accepted the money, and receipted for it. The bank was proceeding to enforce its supposed rights as a junior creditor, under the laws of Illinois, by a sale of the property, when this suit was commenced, in October, 1882, and the sale and further proceedings were temporarily enjoined on the authority of *Hammock v. Loan & Trust Co.*, 105 U. S. 77, which, it was assumed, held that the property and franchises of a railroad company could not be sold on an execution to satisfy a judgment at law. The bank filed its answer and cross-bill. After reciting the facts, the cross-bill prayed that the bank's judgment, and the amount paid to redeem from the sale under the Tabor judgment, be decreed to be a lien upon the property of the Chicago & Pacific Company; that the court take possession of all such property, operate it by a receiver, and, out of the earnings, pay the amount due the bank. Testimony was taken, and the case is now before the court on final hearing.

The Tabor judgment was taken in this court before the foreclosure suit was commenced, and it was a valid lien upon the property of the Chicago & Pacific Company, within the meaning of the lease, when that property was surrendered to the Milwaukee Company. It was necessary to redeem from the foreclosure sale, and thus get rid of the lien of the trust deed executed in 1872, and the decree foreclosing it, before executing the lease and the joint bonds, and the

trust deed to secure them. The Tabor judgment was a lien, second only to the lien of the foreclosed trust deed, and when that lien was discharged, as it certainly was, by the payment and acceptance of the redemption money, the Tabor judgment, so far as the pleadings and testimony show, stood as the first lien. The Milwaukee Company agreed to protect the leased property against all valid judgment liens. The Tabor judgment was such a lien, and the obligation to pay it was no less binding than the obligation to do the other things specified in the lease as part of the consideration for its execution. It is not material, therefore, whether the Milwaukee Company agreed to protect the leased property against the Tabor judgment or not, as that company could not hold and operate the property for its own benefit in disregard of the rights of Tabor or his assignee.

The bank commenced its suit against the Chicago & Pacific Company on February 19, 1880, before the execution of the lease and the last trust deed,—the property then being in the custody of the court,—and took its judgment on April 2, 1882, which was after the Milwaukee Company had taken possession under the lease. It follows that the latter company was not bound by its covenant to pay this judgment or the debt for which it was taken.

Being embarrassed and without credit, the Chicago & Pacific Company was authorized to dispose of its property, as it did in the above arrangement, for the purpose of having the Milwaukee Company do what it, the Chicago & Pacific Company, was unable to do; there being nothing in that arrangement, if fairly carried out, which could prejudice creditors. It was estimated that the bonds would enable the lessee company to redeem from the foreclosure sale, pay all existing judgment liens, complete the road to the Mississippi river, relay the portion already in operation, with steel rails, procure necessary terminal facilities, depot grounds, etc., and fully equip the entire line. The fund arising from the sale of the bonds was to be used for these, and no other, purposes. Any diversion of it, or any part of it, to other objects or purposes was not permitted by the contracts. The road was to be completed to the Mississippi river, not to and across the river.

If the entire proceeds of the bonds had been expended in accordance with the terms of the lease, the bank's debt for the money which it lent to the Chicago & Pacific Company could not be asserted, in law or equity, against the Milwaukee Company, or the leased property in its possession. The record shows, however, that the latter company did all that the terms of the lease obliged it to do, except paying the Tabor judgment, and still had in the treasury a sum sufficient to pay for constructing a bridge across the Mississippi river. The amount due the bank, including the Tabor judgment, should have been paid out of this surplus. The cost of the bridge is not shown by the record, but we may safely assume that it exceeded the bank's

demand. The Milwaukee Company contends that, as lessee, it was entitled absolutely to the entire issue of bonds, and that any surplus remaining, after making necessary expenditures in fulfillment of its contract, it could rightfully use in bridging the Mississippi, or in any other way for its own benefit. It is admitted that the proceeds of the bonds paid for building the bridge; and it is not shown that the Milwaukee Company expended the entire proceeds, or an amount equal thereto, in the manner and for the purposes specified in the lease.

Mr. Edwin Walker, the sole witness in the case, is president of the Chicago & Pacific Company, and general solicitor for the Milwaukee Company. He testified that the former company had no property but the leased property, which had greatly increased in value; that it was in receipt of no income or earnings; that no separate account of the earnings of the leased property had been kept; and that, while he did not know that he could furnish a statement of the precise manner in which the proceeds of the bonds had been expended, he knew the entire amount had been paid out in redeeming from the foreclosure sale, in completing the construction of the road to the Mississippi river, in bridging the river, and in purchasing rolling stock and terminal facilities.

The creditors of the Chicago & Pacific Company, whether holding judgment liens or not upon that company's property when the lease was executed, were entitled to payment out of any remnant of the fund which remained in the treasury of the Milwaukee Company.

A decree will be entered requiring the Milwaukee Company to pay into court, within 30 days, a sum sufficient to satisfy the bank's demand, including the Tabor judgment, and, failing to do so, the bank may move the court for the appointment of a receiver to take possession of the leased property, and operate it until the amount due the bank is paid out of the earnings, or for any other appropriate relief.

---

### WEILER and others v. DREYFUS and others.<sup>1</sup>

(Circuit Court, E. D. Louisiana. 1886.)

#### PLEDGE—INSOLVENCY—ACTION AT LAW.

D., an insolvent, made a dation on payment of a stock of goods to M., for a lawful indebtedness to M., who knew of D.'s insolvency. The goods were delivered to M., who pledged and delivered the same to E. for \$15,000; \$4,000 in cash, and E.'s two promissory notes, payable 60 and 90 days after October 27, 1883. D.'s creditors, these complainants, attached the goods in E.'s hands as the property of D. E. intervened, claiming the goods under his contract of pledge from M. D.'s creditors answered E.'s intervention, alleging that the giving in payment by D. to M., and the pledge to E., were all schemes in aid

<sup>1</sup> Reported by Talbot Stillhuan, Esq., of the Monroe bar.



of the fraud upon D.'s creditors; that all the transactions were mere simulations in fraud of creditors; that if any of the contracts relied on by defendants were real, they were still in fraud of D.'s creditors. E.'s intervention was tried by a jury. The court on that trial would not allow any evidence except as to simulation or no simulation to be heard by the jury, because, if the contracts sought to be avoided were real ones, though in fraud of D.'s creditors, such matters could be heard only on a bill in equity; that the contracts, if real ones, could not be revoked, and the goods subjected to the claims of injured creditors in an action at law. The complainants, being defeated in their suit at law, after the two notes were paid by E., filed this bill to subject the goods pledged to him to the claims of the creditors of D. The court, on hearing the case, declined to give any relief against E. The complainants, in argument of their motion for a new hearing, say: "Admitting the facts to be as the court found them to be, E. paid the two notes after the suit at law, in which he was informed of the fraud on D.'s creditors, was filed, and, the payments being in aid of such a fraud, he is still liable to these complainants for the amount of the notes; that the suit at law charged him with notice not to pay the notes except at his peril." *Held*, that the suit at law could not operate, in law or in equity, as such a notice to E., because E.'s contract of pledge was not a simulation, but a real contract, and he should be protected in his payment of the notes; that a suit cannot be said to give notice to a defendant of any thing or charge beyond the matters that can be tried in such a suit.

#### In Equity.

*D. C. & L. Labatt, C. T. Florance, and Theard & Bros.,* for complainants.

*Singleton & Brown and Morris Marks,* for defendants.

BOARDMAN, J. The proof in this case shows that before October 27, 1883, Dreyfus lawfully owed Meyers, one of the defendants, his son-in-law, about \$26,000. That Dreyfus was then insolvent, and largely in debt, both of which facts were known to Meyers. That Dreyfus, on October 27th, gave, in payment to Meyers, \$20,000 worth of goods, making to him a complete delivery of the same. That said goods were stored in a warehouse, for account of Meyers, to whom the warehouse receipts were given. That Meyers, not then insolvent, made a real pledge of the goods to Erman, one of the defendants, for \$15,000; \$4,000 in cash, and his two negotiable notes for like sums, payable 60 and 90 days after date. The 60-day note was at once negotiated by Meyers, and the last one was paid by Erman at the bank when it became due. That Erman was not at any time an interposed person to aid Dreyfus and Meyers, whatever their understandings and purposes may have been in making their transactions. That the goods, at the time they were pledged, were in the possession and ownership of Meyers, whatever may have been the rights of Dreyfus' creditors upon them; and the pledge was entered into by himself and Meyers in good faith, and for a valuable consideration. That the giving in payment by Dreyfus to Meyers was not a simulated but a real transaction.

In addition to this statement of facts, the record shows that certain suits, on the law side of this court, were filed within the several days following the contract of pledge between Erman and Meyers. In these suits it was alleged that the transactions between Dreyfus

and Meyers and Erman were simulated, and in fraud of complainants, the creditors of Dreyfus. In the suit at law (*Weiler v. Dreyfus*) Erman intervened, claiming the goods under the agreement of pledge. The issues growing out of Erman's intervention were tried by a jury; the court in that case allowing only the matter of simulation or no simulation to be heard. The court ruled that the issue as to whether the pledge was a real one, though fraudulent, could not be heard in an action at law. On the matter of simulation the jury found for the intervenor. After the trial of that issue, and some days after the 90-day note had been paid, the complainants filed this bill in equity, setting forth, as it does, that the pledge to Erman, though a real one, was in fraud of the rights of complainants, the injured creditors of Dreyfus, and prayed that the whole of the transactions between Dreyfus and Meyers, and between Meyers and Erman, be annulled and revoked, and the goods fraudulently pledged be subjected to the claims of these complainants. On this statement of facts, which seems to be all that is necessary for the purposes of hearing and passing upon the issues in this case, the court some days ago, entered a decree for the complainants, so far as their claim against Dreyfus and Meyers were concerned, but refused any relief as against Erman. The matter as to Erman is now being heard on a motion for a new hearing.

The complainants, admitting for the sake of argument that this statement is sustained by the proof, contend that in equity they are entitled to relief as against Erman. They contend that the suits they filed on the law side of this court immediately after the said several transactions between Dreyfus and Meyers, and between the latter and Erman, operated, in law and in equity, to charge Erman with notice that he could pay the two notes only at his peril; that payment, if made by him after the petitions in those suits were served on him, as one of the parties charged therein with aiding in the fraudulent schemes, would be against good conscience and equitable dealing. And they say, further, that, notwithstanding the fact that he has or may have paid the two notes, he should be held liable to account to these complainants for the credit price, \$10,000.

This case, upon the facts as stated by the court, must now be decided upon the matter of law so learnedly and earnestly presented by the senior counsel for complainants. What effect, in the way of legal notice to Erman, should be given to the filing those suits at law? With what notice did the allegations in the petitions served on Erman charge him, and to what extent, in law and in equity, is he affected and bound by such notice?

When the issues affecting Erman's rights in and relations to the transactions which complainants now seek to avoid were tried, the court held that an action to set aside the contract of pledge, on account of its being a mere simulation, could be tried only on the law side of this court; that if the plaintiff sought to avoid the pledge contract

as against them because, though real, it was in fraud of Dreyfus' creditors, the suit could be heard only in equity. The ruling of the court made then I think is sustained by authority. In the suit at law, if only the charge that the contract of pledge was a mere simulation could be tried, can it be said that he was charged with notice of anything beyond the fact that he had no right to the goods because his pledge was not a real contract, but a mere simulation? The service of the petition on him was like saying to him: "You must not pay those notes if your contract of pledge was in aid of the simulated transactions and schemes which we say Dreyfus entered into for the purpose of swindling his creditors, and that if you do pay them in aid of such simulated transactions, and they, on the trial of these suits, are proved up against you, the law will make you pay the same amounts to us."

Under the doctrine of notice contended for by complainants' counsel, can it be said in law that Erman was charged to take notice of anything beyond that which could be passed on in the court from which the notice, by way of the petitions, emanated? It may be said that those suits at law set up or contained two causes for avoiding the pledge made by Meyers to Erman: *First*, that it, the pledge contract, was a mere simulation, in fraud of plaintiffs, and should be set aside; *second*, that, granting the pledge contract was a real one, it was in fraud of Dreyfus' creditors, and, as to plaintiffs, it should be revoked. But if it is the settled practice in this court that only the matter of simulation or no simulation could be tried in a suit at law, and the other matter could be tried only in an equity suit, it seems to follow as a conclusion that the suit operated as a legal notice to Erman that he would be called on only to defend himself against the charges which could be tried and passed on in the trial of that suit. Erman knew that his contract with Meyers was not a simulation, as between himself and Meyers, and he knew, or should have known, because it is the law, that the question as to whether it was a real, though fraudulent, contract of pledge could not be inquired into in the suit pending against him on the law side of the court, and the effect of the notice, at most, could be only to say to him that he should not pay if the contract of pledge was a mere simulation. The plaintiffs in the several suits at law chose to proceed for relief in an action at law, and the result of the trial of the only issue which could be heard in those suits was that Erman's contract was a real one, and not a simulation.

After the last of the two notes had been paid by Erman, this bill in equity was filed. The complainants now pray for relief against Erman, because his contract with Meyers was not a simulation, as was contended for in the suits on the law side of the court, but it was a real contract, which was entered into by Erman to aid Dreyfus and Meyers in their schemes to defraud Dreyfus' creditors. If the notes were now outstanding against Erman, this bill, it being admit-

ted that the purpose of Dreyfus in giving the goods in payment to Meyers was to defraud his creditors, might forbid Erman, except at his peril, to pay the notes, because in doing so he would be aiding in the perpetration and consummation of a fraud on these complainants. The property pledged to Erman consisted of such movable and perishable goods as are easily and frequently interchanged in the active pursuits of commerce. Meyers' possession and ownership of the goods, whatever may have been the rights of Dreyfus' injured creditors on them, was complete as against Dreyfus. The giving in payment to Meyers was not in itself a void contract. Dreyfus intended to give, and did give, the goods to Meyers for a lawful indebtedness to the latter, and the contract, as between them, was completed when Erman became the pledgee of Meyers, and it could not be treated as a simulation by Dreyfus creditors, even if they had had a judgment against Dreyfus, and had pursued the goods while they were in Meyers' possession. But when the goods went out of Meyers' possession, under a *bona fide* contract with Erman, no relief in an action at law could be had against these defendants, and it would be carrying the law of notice too far to say that Erman can now be made to pay the two notes over again to any one.

Motion for new hearing denied.

---

### SWIFT'S IRON & STEEL WORKS v. JOHNSEN and others.<sup>1</sup>

(Circuit Court, E. D. Louisiana. January 23, 1886.)

#### CREDITORS' BILL—RIGHTS OF RECEIVER—PRIORITY OF CREDITORS.

Complainants demand that certain property shall be subjected to the payment of their demand, under the lien acquired by the levy of their writ of *fi. fa.*, and by the service of process under their bill. The receiver of the owner, intervening, shows a prior lien, and an assignment by the conceded owner to satisfy prior judgments. *Held*, that under no adjudged case cited, nor under any principle laid down in the text-books, are the complainants entitled to priority on the ground claimed.

In Equity. On demurrer.

Richard De Gray, for complainant.

B. R. Forman, for intervenor.

PARDEE, J. The complainant's bill in this case, filed April 11, 1885, is a creditors' bill, based on a judgment recovered in this court, April 3, 1885, and a levy of a writ of *fi. fa.* Its object is to subject to said judgment certain real estate said to belong to Johnsen, the judgment debtor, though not standing in his name. In the suit the following bill of intervention has been filed, to-wit:

<sup>1</sup> Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

"The petition of Frederick G. Freret, receiver, a citizen of the state of Louisiana, and residing in the city of New Orleans, La., with leave of the court first had and obtained, prays leave to intervene in this suit, and thereupon your petitioner alleges and says that on the twentieth February, 1884, the George F. Blake Manufacturing Company, a corporation established under the laws of Massachusetts, and a citizen of said state, and the Eaton Coal & Burnham Company, a corporation established under the laws of Connecticut, and a citizen of said state, and Spang, Chalfant & Co., a firm composed of Charles H. Fang, Campbell B. Huron, John W. Chalfant, citizens of Pennsylvania, having previously obtained judgment in this honorable court against the said Charles G. Johnsen, and having issued writs of *feri facias* against the said Charles G. Johnsen, which were returned *nulla bona*, filed their creditors' bill on the said twentieth February, 1884, against the said Charles G. Johnsen, their debtor, for the appointment of a receiver and the discovery of assets. That upon a hearing of the said bill and the exhibits on the third of March, 1884, this honorable court appointed your petitioner, Frederick G. Freret, receiver of all the property, equitable interest, things in action, and effects of the defendant, Charles G. Johnsen, or belonging to or in any way appertaining to the said Charles G. Johnsen at the time of the commencement of said action, to-wit, on the twentieth February, 1884, or within one year previous to the sixth December, 1883, and subject to the revocatory action of the Civil Code of Louisiana. That by the said decree your petitioner, the said receiver, was vested with all the rights and powers of a receiver in chancery, and to all the rights, and property, and credits, and things in action, of the said Charles G. Johnsen, the debtor. That thereafter your petitioner filed his bond and qualified as such receiver, which was duly approved, and the final appointment made and signed, by the honorable judge of this court, on the twenty-ninth November, 1884; and pursuant to a decree entered against the said Charles G. Johnsen, on the twenty-third December, 1884, the said Charles G. Johnsen made an assignment of all his property, rights, and credits, and things in action, and delivered the same to the receiver, a few days after the decree of the said court, which deed was passed before the master, A. G. Brice, and registered in the conveyance office. That by virtue of the said decrees of this honorable court, in the suit No. 10,490, entitled the '*George F. Blake Manufacturing Company v. Charles G. Johnsen*,' your petitioner became in law and equity vested with all the property, rights, and credits of said Charles G. Johnsen, or in which he had any interest, direct or indirect, on the twentieth February, 1884, and thereby your petitioner became vested with all the property described and referred to in the bill of *Swift's Iron & Steel Works v. Charles G. Johnsen*, No. 10,962, for the benefit of the complaining creditors. Whereupon your petitioner prays for leave to intervene in this cause, and that the complainants, through their counsel, be notified hereof, and that the property described in the said bill be, on final hearing and decree, decreed to belong to and to be vested in your petitioner as such receiver of this court, and be ordered to be sold by this receiver for the benefit of the complaining creditors, to-wit, the complainants in the creditors' bill of *The George F. Blake Manufacturing Company and others versus Charles G. Johnsen*, No. 10,490; and your petitioner prays and craves leave to refer to and to make a part of this petition the record of said proceedings in suit No. 10,490, entitled '*The George F. Blake Manufacturing Company versus Charles G. Johnsen*;' and your petitioner prays for all general and equitable relief in the premises, and will ever pray."

The complainant has demurred and excepted to the said intervention, and the matter has been argued. No question of formality in regard to either the bill of intervention or the demurrer is suggested.

The question submitted to the court is whether, on the facts stated in the bill of intervention, the receiver is entitled to the property described in complainant's bill, or, if sold, to the proceeds thereof. As the property never stood in Johnsen's name, and as none of the judgments referred to appear to have been recorded, there is no pretense of any judgment lien. As in the case of *Miller v. Sherry*, 2 Wall. 237, the question to be determined arises wholly out of the chancery proceedings.

The bill filed by the Blake Manufacturing Company and others gave them, from the service of process, a lien—a general lien—upon the effects of Johnsen; and entitled them to a discovery, an injunction, and a receiver. The order of the court appointing a receiver, and the subsequent conveyance of Johnsen to the receiver, in pursuance thereof, vested a complete title in the receiver of all Johnsen's legal and equitable estate, subject only to rights previously acquired. This estate vested in the receiver prior to the judgment of the Swift Iron & Steel Works, and to their creditors' bill to subject specific property of Johnsen to the satisfaction of their judgment. To sustain their right to proceed against specific property as the property of Johnsen, and thus to get preference over the prior title of the receiver, and the lien of complainants under their prior creditors' bill, the complainant's sole reliance is upon the fact that the said specific property is not described in the original creditors' bill, and therefore, as to such property, there is no *lis pendens*.

To sustain this position the case of *Miller v. Sherry*, *supra*, is cited, and it sustains counsel as to the necessity of the description of the property in order to constitute *lis pendens*. But it does not seem that the present is any case for the consideration of rights or interest acquired *lis pendens*. There has been no sale of the property, no title has passed, and there is no purchaser with or without notice before the court. The complainants' demand is that certain property shall be subjected to the payment of their demand under the lien acquired by the levy of their *fi. fa.* and by the service of process under their bill. The intervenor shows a prior lien, and an assignment by the conceded owner to satisfy prior judgments. Under no adjudged case cited, nor under any principle laid down in the text-books, are the complainants entitled to priority on the ground claimed.

True, it may be that if the intervenor kept silent, and the complainants had obtained a decree ordering the sale of the property, and under the decree a sale had been made, a purchaser at such sale would not be charged with constructive notice of the proceedings in *Blake Manufacturing Company v. Johnsen*, and if he had no actual notice, would have a clear title; and to such effect is the case of *Miller v. Sherry*, *supra*. In that case, which was an action of ejectment on titles derived under creditors' bills, the court says, speaking of the defendant's grantor, the purchaser under decree in the junior creditors' bill:

"His right could not be affected by anything that occurred subsequently. He had no constructive notice of the proceedings in the *Case of Mills & Bliss*, [that is, of the senior creditors' bill.] Had he and his alienee actual notice? This also is a material inquiry. We have looked carefully through the record, and find no evidence on the subject. Had the suit below been in equity it would have been necessary for the defendant in error to deny notice to himself or to his grantor. The want of notice to either would have been sufficient. The form of the action rendered a denial necessary."

In this present case there is no question of notice, as the intervention herein is full notice to complainants. There is nothing in the delay of the intervenor to take possession of the property calculated to impair his right. The Swift's Iron & Steel Works do not appear to have been prejudiced by the delay.

The demurrer should be overruled.

---

HUGHES v. DUNDEE MORTGAGE TRUST INVESTMENT Co., Limited.  
(No. 1,065.)

(Circuit Court, D. Oregon. March 31, 1886.)

1. ACTION ON AN ENTIRE DEMAND.

Where an action is brought on a part only of an entire and indivisible demand, the pendency thereof may be pleaded in abatement of another action on the remainder, and a judgment in either may be pleaded in bar of the other.

2. CASE IN JUDGMENT.

H. was appointed the attorney of the defendant, a foreign corporation engaged in loaning money in Oregon on note and mortgage, and on February 12, 1883, after being so employed about eight years, he brought an action against said corporation to recover the sum of \$21,258.80, the alleged value of his services for that period, without specifying any particular service, except attending to two suits, for which he claimed the sum of \$755.80, and had judgment thereon for \$8,407.61, and \$390.05 costs and disbursements; and afterwards, on September 5, 1884, he brought this action against said corporation to recover the sum of \$11,222.74, with interest from January 31, 1880, for services as an attorney during the period covered by the former action, in making and delivering to the defendant 554 certificates of the title to lands offered to the latter as security for loans, the sum demanded being equal in amount to 1 per centum of the moneys loaned on the lands included in said certificates. *Held*, that the claim now sued for was a part of an entire and indivisible demand and cause of action, existing when the former action was brought, and that the judgment therein is a bar to this action.

3. ATTORNEY AND CLIENT.

The services of a standing or regularly appointed attorney are usually rendered pursuant to some general agreement or understanding, and whatever is due therefor at the expiration of the service or employment constitutes but one cause of action; and courts should be careful in such cases, in the application of a rule against splitting up demands, not to leave any loop-hole through which an attorney may be tempted to harass and oppress his client with vexatious or spiteful litigation.

Action to Recover Attorney's Fees.

*Ellis G. Hughes, pro se.*

*Earl C. Bronaugh, for defendant.*

DEADY, J. This action was commenced on September 5, 1884, to recover the sum of \$11,222.74, with interest from January 31, 1880, to date, amounting in all to \$15,350.19. It is alleged in the complaint that the plaintiff is a citizen of the state of Oregon, and the defendant is a corporation duly formed under the laws of Great Britain, having its principal office at Dundee, Scotland, and is now lawfully engaged in business in Oregon, and that the Oregon & Washington Trust Investment Company was, from January 1, 1875, to January 31, 1880, a corporation also duly formed under said law, engaged in loaning money in Oregon and Washington on note and mortgage, with an agency at Portland; that during said period plaintiff was a practicing attorney at law, resident at Portland, and at the request of said trust investment company, and for its use and benefit, did "make and issue to it in writing" 554 separate certificates, whereby he became responsible to said corporation that the title to the real property mentioned therein was in the party seeking a loan thereon, and that the same was free from all liens and incumbrances, for which service and responsibility said trust investment company "undertook and agreed to pay the plaintiff the reasonable value" thereof, which is 1 per centum on the amount of the loans made on said certificates, namely, \$1,122,274, and that said trust investment company, on January 31, 1880, by reason of the issuing of said certificates, became and was indebted to the plaintiff in the sum of 1 per centum on said amount, namely, \$11,222.74; that on January 31, 1880, said trust investment company amalgamated with the defendant, and assigned all its property thereto, in consideration whereof the latter "did assume and agree to pay all and every of the debts and liabilities" of the former, including the debt due the plaintiff; but that neither of said corporations has paid the same, or any part thereof, and the whole is now justly due him from the defendant.

Among other defenses, the answer of the defendant contains the following: The plaintiff ought not to have or maintain this action because, on February 12, 1883, he commenced an action against the defendant in this court, alleging in the complaint therein that said trust investment company did, about January 1, 1876, appoint the plaintiff its attorney, to attend to its business in Oregon and Washington, pursuant to which the plaintiff did, between January 1, 1876, and January 1, 1880, render service to said corporation "in consulting and advising it about its business, and other acts and attendance in and about said business, at its request, of the value of \$2,500 per annum;" that about January, 1880, said corporation amalgamated with the defendant, who thereupon "assumed its indebtedness and liabilities, including its indebtedness to plaintiff," and that "thereafter the plaintiff rendered services to the defendant as its attorney, and paid out money for it, up to January 1, 1882," the value of which amounted to \$2,500; that it was also alleged in the complaint in said action that the defendant was indebted to the plaintiff for serv-



ices rendered in two certain law suits in the further sum of \$755.80, and that the aggregate of defendant's liability to plaintiff on these several accounts was \$21,258.80; that the defendant made a defense to the action, and on the trial thereof the plaintiff had judgment for the sum of \$8,407.61, and \$390.05 costs and disbursements, which judgment remains in full force and effect. It is then alleged in the defense that the service mentioned in the complaint herein was rendered before the commencement of said former action, and that whatever sum of money may be due the plaintiff for or on account of such service was due prior to the commencement of said former action; and that all the service alleged in the complaint herein to have been rendered to the trust investment company, and to this defendant, was performed under an appointment of plaintiff as the attorney of the trust investment company and this defendant, as alleged in the complaint in said former action; wherefore the defendant says that the plaintiff is "by said former judgment forever barred from recovering herein."

To this defense the plaintiff demurs, for that it does not contain facts sufficient to constitute a defense; and the point relied on in the argument in support of it is "that it does not appear that the claim or account of the indebtedness of the trust investment company made in the former action was placed [put] in issue, litigated, or passed in to judgment therein." The point was also made that the judgment in the former action was suspended by operation of the writ of error sued out thereon by the defendant, but was afterwards specially withdrawn.

In support of the point the plaintiff cites 1 Tidd, Pr. 685; *Russell v. Place*, 94 U. S. 610; and *Bigelow, Estop.* 587-589. It is apparent from this that the plaintiff has misconceived the nature of this plea or defense. It is not, as he appears to think, a plea of a former recovery or adjudication of the claim sued on here, and that, therefore, it must show, with the certainty required in pleading an estoppel, that such claim was made and passed on in said former action. But the defense is a plea that the plaintiff brought a former action on the same cause of action,—the same contract or account,—by reason of which he is barred from maintaining another action thereon, or any part thereof, although such part may not have been actually set up in the other action.

This defense is not an estoppel, but a bar, founded on a rule of public policy, as just and expedient as the statute of limitations. This rule declares that no one ought to be twice vexed for the same cause,—*nemo debet bis vexari pro eadem causa*. It assumes that it is better that a plaintiff who wantonly or negligently splits a claim into parts for the purpose of suit should lose one of them than that the adverse party should be needlessly harassed by litigating, in detail, matters that could and should have been determined in one action. As was said by Mr. Justice NELSON, in *Guernsey v. Carver*, 8 Wend.

494, "the law abhors a multiplicity of suits," and therefore, if a party bring an action on a part only of an entire and indivisible demand, the pendency thereof may be pleaded in abatement of another action on the remainder, and a judgment in either may be pleaded as a bar of the other. *Bagot v. Williams*, 3 Barn. & C. 235, S. C. 10 C. L. 115; *Logan v. Caffrey*, 30 Pa. St. 196; *Warren v. Comings*, 6 Cush. 103; *Lucas v. Le Compte*, 42 Ill. 303; *Farrington v. Payne*, 15 Johns. 432; *Guernsey v. Carver*, 8 Wend. 492; *Bender-nagle v. Cocks*, 19 Wend. 207; *Beekman v. Platner*, 15 Barb. 551; *Reformed P. D. Church v. Brown*, 54 Barb. 191. *Secor v. Sturgis*, 16 N. Y. 548; *Baird v. U. S.*, 96 U. S. 430.

In *Secor v. Sturgis*, *supra*, 554, it is said:

"The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment on the merits in either will be available as a bar in the other suits."

In *Baird v. U. S.*, *supra*, 432, Mr. Chief Justice WAITE, speaking for the court, says:

"It is well settled that where a party brings an action for a part only of an entire and indivisible demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same demand. *Warren v. Comings*, 6 Cush. 103. Thus, if there are several sums due under one contract, and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue." See, also, to the same point, *Bender-nagle v. Cocks*, *supra*, 215.

Occasionally the application of this rule involves a nice question. The case of *Secor v. Sturgis*, *supra*, may be taken as one that leans, if at all, to the plaintiff's side of the question. Three brothers, under the name of Chas. A. Secor & Co., carried on the business of ship carpenters and chandlers in a house in New York, the former being conducted on one floor thereof, under the management of two of the parties, and the latter on another floor, by the third one. Separate books of account were kept of the two departments, and separate bills rendered therefor. Under these circumstances, carpenter work and articles of ship chandlery were done and furnished to the brig Leverett, for the defendant. The court held that the demands were distinct, and that a judgment in an action for one of them was no bar to an action on the other. In the course of the opinion it was said:

"The true distinction between demands or rights of action which are single or entire, and those which are several and distinct, is that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps, as simple and safe a test as the subject admits, by which to determine whether a case belongs to one class or the

other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass or conversion of fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be. In respect to contracts, express or implied, each contract affords one, and only one, cause of action."

The case of *Baird v. U. S.*, *supra*, arose on a contract to furnish the United States 15 locomotive engines, in 1864, at a fixed price, with the addition of any advance that might take place in the cost of labor and materials used in their construction after November 9, 1863, and any damage resulting from the preference given in this order over other contracts. The engines were duly delivered, and the fixed price paid. A claim was also presented for the advance in labor and materials, which was audited, and about two-thirds thereof allowed and paid. Subsequently an action was brought in the court of claims for the damages sustained in giving preference to the government order, in which judgment was given against the United States. On May 2, 1870, another action was brought in the court of claims to recover the "residue of the amount of the advance in labor and materials," in which, although the court found that the advance, over and above the amount paid, was the sum claimed, there was judgment for the defendant. Thereupon the claimant appealed to the supreme court, where the judgment was affirmed, the court holding that the claims for construction, advance, and damage were all embraced in one contract, and constituted but one demand and cause of action. In the course of the opinion Mr. Chief Justice WAITE said:

"Here was a contract by which the government was bound to pay for the engines in accordance with terms agreed upon. The entire price to be paid was not fixed. A part was contingent, and the amount made to depend upon a variety of circumstances. When the former action was commenced in the court of claims the whole was due. Although different elements entered into the account, they all depended upon and were embraced in one contract. The judgment, therefore, for the part then sued upon, is a bar to this action for the 'residue.'"

In *Reformed P. D. Church v. Brown*, *supra*, the defendant's testator had agreed in writing to pay the sum of \$100 a year for the support of a minister of the gospel, in the township of Westfield, Staten island. At the testator's death four years' subscription were due on the writing, on which nothing had been paid. The plaintiff then sued the defendant, as executor, for the first \$100 due on the writing, and had judgment therefor, and on the day following brought an action to recover the remaining three years' subscription. The court held that the judgment in the first action was a bar to the second one, saying:

"In order to avoid multiplicity of actions, the law forbids that a cause of action shall be split up for the purpose of bringing several actions. But when several claims, payable at different times, arise out of the same contract or transaction, separate actions can be brought as each liability inures. Still, however, if no action is brought until more than one is due, a recovery in the one first brought will be an effectual bar to a second action brought to recover the other claims that were due when the first was brought."

Taking the application of the rule, as made in these cases, it is clear that the plaintiff's demand or cause of action against the defendant for services rendered the trust investment company, as an attorney, and the demand or cause of action for similar services rendered itself, were, as they existed on February 12, 1883, the day on which the former action was commenced, entire and indivisible. Shortly, it appears from the plea that the plaintiff alleged in the former action, as the cause thereof, that he was appointed or employed as the standing attorney of the trust investment company from January 1, 1876, to January 1, 1880, when it was merged in the defendant, for whom he continued to act in the same capacity until January, 1882.

Assuming, as I have, that there was a distinct contract or employment by each corporation, though much might be said, if it was material, in support of the proposition that the service of the plaintiff was a continuous one, the latter corporation being in fact the legal prolongation of the other, still the plaintiff's demand or cause of action for the service rendered each corporation was an entire and indivisible one. Both these demands were joined in the action of February 12, 1883, and whatever was then due from the defendant on account of such services was a part of the causes of action on which said action was brought. If the plaintiff then had a claim against the defendant for services as an attorney, as alleged herein, it was a part of his cause of action, and should have been included therein; for, if he could divide the account into advice and counsel, attending suits in court, preparing certificates of title, so as to make three causes of action out of the transaction, there is nothing but his own temerity or sense of propriety to prevent him from subdividing it *ad infinitum*, so as to have a separate cause of action for each item of advice, or the 554 certificates of title mentioned in his complaint. By such means the plaintiff might make for himself, out of a comparatively short service, almost a perennial cause of action.

In the consideration of this case I have constantly had in mind the fact that the claims made by the plaintiff against the defendant grow out of the employment of the former by the latter as its attorney. In the nature of things, the services of a standing or regularly appointed attorney are usually rendered pursuant to some general contract or understanding, and whatever is due therefor at the end of the service or employment constitutes but one cause of action, and cannot be split up into several distinct ones. *Lucas v. Le Compte*, 42 Ill. 303. In the application of the salutary rule against splitting up demands, courts ought to be careful to leave no loop-hole through which an attorney may be tempted to harass and oppress his client with vexatious or spiteful litigation. Such things are well calculated not only to bring the profession of the law into disfavor, but the administration of justice into disrepute.

The demurrer is sustained.

**HUGHES v. DUNDEE MORTGAGE & TRUST INVESTMENT CO. (Nos. 1,066 and 1,069. Two Cases.)**

Action to Recover Attorney's Fees.

DEADY, J. These two cases were argued and submitted with the foregoing. The facts in the cases are similar, and the question made on the demurrers to the defenses is the same.

In No. 1,066 it appears that the Oregon & Washington Mortgage Savings Bank was incorporated under the laws of Great Britain, and engaged in loaning money in Oregon and Washington; that the plaintiff was its attorney, and as such, prior to January 1, 1882, made and delivered to it 347 certificates of titles to certain lands, on which it loaned \$565,103.59; that said certificates were worth 1 per centum of that sum, or \$5,651.03; that in August, 1882, said corporation amalgamated with the defendant, who assumed to pay its debts, including the claim of the plaintiff, which, with interest, amounts to \$8,907.07.

In 1,069 it appears that the defendant was incorporated under the laws of Great Britain prior to 1879, and has since been loaning money in Oregon and Washington; that in 1879, 1880, and 1881 the plaintiff was the attorney of the defendant, and as such made and delivered to it 297 certificates of title to certain lands, on which it loaned \$589,000; that said certificates were worth 1 per centum of that sum, or \$5,890, which, with interest, amounts to \$7,139.85.

In both these cases the defense is made that the judgment given in the action commenced February 12, 1883, is a bar, to which the plaintiff demurs as in case 1,065, *ante*, 831.

The defense is sustained, and the demurrer overruled, for the reasons given in that case.

**HOWARD and Wife v. DENVER & R. G. RY. CO.<sup>1</sup>**

(Circuit Court, D. Colorado. March 23, 1886.)

**MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANTS—ENGINEER IN CHARGE OF ENGINE AND FIREMAN ON ANOTHER TRAIN.**

A fireman on a passenger train, and an engineer in charge of an engine not connected with such train, but belonging to the same railroad company, are fellow-servants, and where the fireman is killed by a collision between the engine and the train caused by the negligence of the engineer the company will not be liable.<sup>2</sup>

Action against a railroad company to recover damages for the death of an employe caused by negligence. Plaintiffs obtained a verdict, and defendant moves for a new trial. The material facts are stated in the opinion.

*Rogers & Cuthbert*, for plaintiffs.

*E. O. Wolcott*, for defendant.

BREWER, J. This is a motion for a new trial which, by the direction of the trial judge, has been referred to me for decision. As I was not present at the trial, I feel at liberty to consider only the principal question upon which the ruling of the trial judge was made.

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

<sup>2</sup> Respecting the liability of the master for an injury caused by the negligence of a fellow-servant, and herein of who are fellow-servants, see *Garraby v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258.

The facts which present that question are these: The plaintiffs are the parents of one John H. Howard, who, on May 19, 1883, was killed in a collision on defendant's road. Young Howard was employed as a fireman, working on the regular passenger train running west on that day from Pueblo to Leadville. That train was running on schedule time, and about a quarter of a mile west of Badger Station collided with a light engine running eastward, under the management and control of one William Ryan, its engineer. Ryan neglected his instructions, and his negligence was the proximate cause of the collision. There was no proof of incompetence on his part, or of negligence in employing him, or in the order under which he was acting and which he disobeyed. The case rested simply on the fact of his negligence. The trial judge held that his negligence was the negligence of the company, and that he was not a fellow-servant with the deceased. This, then, is the single question presented. The rules of the company provided that an engineer running a light engine like this, without any separate conductor, should be regarded as both engineer and conductor. The question, therefore, is distinctly presented whether, in case of collision between a train and an engine, the negligence in the management of the engine, whereby injury results to the employes on the other train, is to be regarded as the negligence of the company, or simply the negligence of a fellow-servant. Obviously, the question is of no slight importance.

It will not be doubted that the early current of judicial decision in this country was such as to affirm that employes, situated as Ryan and the deceased, were fellow-servants. The great and leading case was that of *Farwell v. Boston & W. R. Co.*, 4 Metc. 49, in which the opinion was written by Chief Justice SHAW. He there stated the rule to be that all persons employed by the same master, and engaged in a common enterprise, were fellow-servants, no matter what the relation in which they stood to each other. This case was generally followed, both in this country and England, and the principles enunciated thereon were accepted as correct. Nor, on the other hand, can it be questioned that the later current, both of judicial decision and legislative action, is away from that ruling in many respects.

By action of the legislature in at least two states—Kansas and Iowa—the railroad company is made responsible to every employe for the negligence of every other employe, so that in these states the doctrine of fellow-servants in respect to the question of negligence has ceased to have any recognition. Outside of these states, by the rulings of many courts, the case of *Farwell v. Railroad Co.* has been much limited and restricted. One marked limitation is this: Wherever the master owes an absolute duty to the employes, and instead of discharging that duty himself intrusts it to an agent or servant, such agent or servant is not a fellow-servant within the meaning of the rule of liability for negligence. Thus, the master owes to every employe the duty of providing a reasonably safe place in which to

work, and reasonably safe instruments and machinery with which to work. This may be called a direct and absolute obligation. If the discharge of this obligation is intrusted to an agent or servant, such agent or servant is the representative of the master, and any negligence on his part is the negligence of the master.

Thus, in the case of *Calor v. Charlotte, C. & A. R. Co.*, decided by the supreme court of South Carolina at the April term, 1885, the plaintiff, a locomotive engineer, while running his engine between Columbia and Charlotte, was injured through the negligence of a section-master and supervisor of the track-laying force, who, in disregard of the appropriate signals, took up a portion of the track, and thus derailed the engine. The court held that the true test was whether this section-master was employed to discharge the duties of the master, and also that it was the duty of the master to provide a suitable and safe place for his employes to work in and on, which duty had, in this case, been committed to the section-master. His negligence was therefore properly adjudged the negligence of the master.

The same principle was recognized in the case of *Morris v. Richmond & A. R. Co.*, decided by the court of appeals of Virginia, in April, 1884, and reported in 8 Virginia Law J. 540. In that case, the decedent, whose administrator was plaintiff, was a brakeman on a material-train. A section gang at work on the track failed to signal the train, although it had the rails misplaced. In consequence, the train was derailed, and the decedent injured so that he died in eight hours. The court held that the section-men and the decedent were not fellow-servants, saying that "where a company delegates to an agent or employe the performance of duties which the law makes it incumbent on the company to perform, his acts are the acts of the company,—his negligence is the negligence of the company;" citing *Brothers v. Carter*, 52 Mo. 372; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *Mullan v. Philadelphia & S. M. S. Co.*, 78 Pa. St. 25; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171.

The case of *Davis v. Central Vt. R. Co.*, 55 Vt. 84, is a well-considered case upon this point. In that case it appeared that, through the negligence of the company's bridge builder in constructing, and of the road-master in repairing, a culvert, it washed out, whereby a foreman was killed. The company was held responsible. The court said:

"The bridge-builder and road-master, while inspecting and caring for the defectively constructed culvert, were performing a duty, which, as between the intestate and defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant."

Among other cases affirming the same doctrine may be cited the following: *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495; *O'Donnell v. Railroad Co.*, 59 Pa. St. 239; *Nashville & C. R. Co. v. Carroll*,

6 Heisk. 348; *Tierney v. Minneapolis & St. L. Ry. Co.*, 33 Minn. 311; S. C. 23 N. W. Rep. 229; *Atchison, etc., R. Co. v. Holt*, 29 Kan. 149; *Fuller v. Jewett*, 80 N. Y. 46; *Slater v. Jewett*, 85 N. Y. 61; *Gunter v. Graniteville Manuf'g Co.*, 18 S. C. 262; *Gilmore v. Northern Pac. R. Co.*, 15 Amer. & Eng. R. Cas. 304, and note.

Another important limitation is that where an employe is placed in charge of the entire operations, or of a separate department, so that in respect to the entire work, or the separate department, he has full control, is, so to speak, a vice principal—an *alter ego*—of the master, his negligence is that of the master, and not that of a fellow-servant. Thus the general superintendent of a railroad, the superintendent of bridges, the road-master, the foreman in charge of the machine-shops, have all been declared vice-principals, and their acts the acts of the master. And in a late case, which has attracted great attention, that of the *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, S. C. 5 Sup. Ct. Rep. 184, it was held that the conductor of a train came within the same category. The reason underlying this is that by reason of the extent of the authority conferred, the power and discretion vested in such employe, the fact that practical supremacy and control is given to him, it is fitting that he should be regarded as the active, present representative of the master,—one in whom the master has placed such confidence, and to whom he has so far transferred his powers, as to make him his other self. Among many authorities affirming this doctrine may be cited the following: *Railroad Co. v. Fort*, 17 Wall. 553; *Grizzle v. Frost*, 3 Post. & F. 622; *Cook v. Hannibal, etc., R. Co.*, 63 Mo. 397; *Whalen v. Centenary Church*, 62 Mo. 326; *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205; *Lalor v. Chicago, etc., R. Co.*, 52 Ill. 401; *Mullan v. Philadelphia, etc., S. Co.*, 78 Pa. St. 25; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Malone v. Hathaway*, 64 N. Y. 5; *Brickner v. New York Cent. R. Co.*, 49 N. Y. 672.

An effort has been made to engraft another exception, to the effect that where the master sees fit to place one of his employes under the direction and control of another, the relation of fellow-servants does not exist, and the latter, in all his actions towards the former, is the representative of the master, and his negligence the negligence of the master. As in all the subdivisions of service,—no matter how minute,—in all separate work,—no matter how small the work,—there is generally a foreman or boss in charge, having control and direction, though often working with the others, the recognition of such an exception, as thus broadly stated, would largely increase the responsibility of the master. Nevertheless, the rule has been thus laid down by several courts. The supreme court of Kentucky, in *Louisville & N. R. Co. v. Bowler*, 11 Alb. Law J. 119, in which case a section-hand had been injured through the negligence of his section boss, decided "that the only sound rule is to hold the common superior, which can only act through its agents, responsible for injuries



resulting to the subordinate from the negligence of his immediate superior or party having control over him." Similar was the ruling of my predecessor, Judge McCrory, in several cases, among them that of *Railway Co. v. Ross*, affirmed by the supreme court. 112 U. S. 377; S. C. 5 Sup. Ct. Rep. 184. Such also was the decision of the supreme court of Ohio in *Railway Co. v. Keary*, 3 Ohio St. 201, in which case the court said: "No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other."

Notwithstanding these decisions, the great weight of authority is against the proposition, and the rule of exception in respect to subordination limited to the case of departmental control as stated in my second proposition. Such, I think, is the clear import of the opinion in *Railway Co. v. Ross*, *supra*, which, considered in relation to the course of the trial and the instructions of the trial judge, seems to me impliedly to reject the doctrine that mere subordination destroys the relation of fellow-servants, and to insist upon departmental control as the test. In that case the trial judge charged explicitly as follows:

"It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow-servants, engaged in the common employment, within the meaning of the rule of law of which I am speaking."

This was the instruction excepted to. The case was one in which an engineer had been injured through the negligence of the conductor in charge of his train. Now, if the reviewing court had been of opinion that the rule as stated by the trial judge was correct, naturally the opinion would have been an argument in support of it. On the contrary, nowhere in the opinion, which is elaborate and extensive, is there a single word in support or defense. The entire opinion goes to the effect that the conductor of a train, by virtue of his large powers and exclusive control, is properly one "clothed with the control and management of a distinct department," and therefore to be regarded as a vice-principal,—a representative of the company. It is expressly stated that the language of the instruction is open to criticism, but is not erroneous as applied to the facts in the case. In other words, that where departmental control exists the relation of fellow-servants does not. Further, in every case which is cited approvingly, and which bears directly on the question, the rule of departmental control was in terms recognized; or, as in the Ohio cases, in which the conductor of the train was the negligent party, the facts supported the conclusion of the supreme court. When we remember that this case was decided by a closely divided court, after evidently much deliberation, it seems an unavoidable conclusion that that court does not approve the rule laid down by the trial court.

Another exception which has received considerable recognition is, that where two employees, though serving the same master, are en-

gaged in a different class of work they are not to be regarded as fellow-servants, within the rule. Thus, in Illinois, it has been held that a book-keeper in a railway office was not a fellow-servant with an engineer, (*Chicago, etc., R. Co. v. Keefe*, 47 Ill. 110;) and also that a laborer in the carpenter shop was not a fellow-servant with the engineer, (*Ryan v. Railway Co.*, 60 Ill. 177.) A late case was decided by Mr. Justice MILLER of this circuit (*Garrahy v. Railroad Co.*, reported in 25 Fed. Rep. 258) in which it was ruled "that a common hand, engaged in the business of distributing iron rails along the side of the track to be laid in place of other rails removed from the track, and under the control, with six or eight other men, of a boss or foreman, is not in the same employment as a man controlling or managing a switch engine not used in carrying these rails, but in moving and transferring from one place to another cars not engaged in the business of relaying said track."

These are the only exceptions which it seems to me can in any manner be invoked to sustain the ruling of the learned trial judge; and I am constrained to believe that neither of them is sufficient.

So far as the place and machinery are concerned, both were safe. There is no pretense that the track was not in good order, or that the engines or other instruments for the movement and control of the train were not sufficient. This statement is made in respect to the matter ruled upon by the trial judge, and which alone I feel at liberty to consider. It will not do to say that, because Ryan's engine was in the way, and collided with decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a safe place for the employe to work in and upon. The negligent use by one employe of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employes. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employe of the machinery shall create danger. Neither can it be said that Ryan and decedent were engaged in a different class of work. Both were employed in the movement of trains,—the same kind of service. True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But, being engaged in the same kind of service and on the same division, they must naturally have often been thrown into contact and had ample opportunities for mutual supervision. To subdivide beyond the class of service, into the place of work, would carry the exception beyond well-recognized limits. It would make the train-men on one train not fellow-servants with those on another; the carpenters and machinists in one room

strangers in service to those of another; one gang of section-men not co-employees with another,—and all because, at the time, their places of work happened to be different. In the *Garrahy Case*, *supra*, Mr. Justice MILLER carefully notes the complete separation in the class of service of the two employees, while in the *Randall Case*, to be considered hereafter, the supreme court treated the fact that the employees were working on different trains as entirely immaterial. He who engages in train service knows that other trains besides his will be running, and may fairly be considered as contracting to take the risk of the negligence of the employees managing such trains. He must expect to be employed now on one train and now on another, to be thus thrown into contact with the other employees in that service, to know himself what is proper care in such work, and to be able to detect any evidence of carelessness on the part of those in like service. Every consideration which exempts the master from liability for the negligence of a co-employee seems to bind those in the same class of service together as fellow-servants.

Neither can this be considered a case of the negligence of one in charge of a department. While, by the rule of the company, the engineer in charge of a light engine is to be regarded as the conductor, yet this rule obviously contemplates the matter of reports, etc.,—the mere duties owing to the company for the purpose of giving and preserving complete information of the engine's movements,—and should not be construed, even if it were possible for a simple rule so to do, as lifting one with so little power, and but a single subordinate, into the dignity of a departmental director. We should always look to the substance of things, and not dignify with undue importance that which is properly but a mere regulation of details, or a mere means of information. It is true that an engineer in charge of a moving engine is placed in a position in which his negligence may cause serious disaster. So is every one in control of a power so tremendous as steam, whether in a moving or stationary engine. But the possibilities of disaster from his negligence do not make him any the more a representative of the master. They simply cast upon the master the duty of greater care in his selection. To make one as the controller of a department properly the representative of the master, his duties should be principally those of direction and control. He should have something more than the mere management of machinery; he should have subordinates over whose various actions he has supervision and control, and not a mere assistant to him in his working of machinery. He should have control over an entire department of service, and not simply of a single machine in that service. He should be so lifted up, in the grade and extent of his duties, as to be fairly regarded as the *alter ego*—the other self—of the master. I think I only voice the general judgment of the profession in saying that the decision in the *Ross Case* was a surprise, and that it carried the doctrine of departmental control to the extreme. To extend it to the

case of an engineer running a light engine, with no train,—no subordinate save the fireman,—would, it seems to me, be judicial legislation.

I have thus far considered this case upon general principles. I now turn to a case in the supreme court, recently decided, that of *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, S. C. 3 Sup. Ct. Rep. 322, which seems to me so closely in point as to compel the decision here. In that case a brakeman unlocking a switch, to enable his train to pass from one track to another, was injured by the tender of a freight-engine in no way connected with his train. Negligence was charged upon the engineer managing this engine. The supreme court unanimously held the brakeman of the one train and the engineer of the separate engine fellow-servants. In the opinion we find this language:

"Persons standing in such a relation to one another as did this plaintiff and the engineer of the other train are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is already shown by the cases cited in the margin. They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master.

Every test which the learned judge lays down for determining the question of fellow-servants applies fully and exactly to the case at bar: Common employer and pay-master; same place of work, exposing one to injury from negligence of the other; same class of service; neither subject to other's control. Unless we regard Ryan as a departmental director, which, for reasons heretofore indicated, I think cannot be done, the cases are substantially parallel. Of course, if so, that decision controls the case.

I am aware that the *Ross Case* is a later expression of that court, and it is claimed overrules it. The opinion in that case contains no reference to this, does not purport to overrule it, and, with the construction I have placed upon it above, is in entire harmony with it.

One other case has been cited, that of *Feitzman v. P. F. & C. R. Co.*,<sup>1</sup> recently tried in the United States circuit court for the Northern district of Illinois. In that case, through the negligence of a switch conductor, an engineer of a switch-engine, subject to the control of another switch conductor, was injured, and the learned circuit judge in his charge to the jury ruled that the parties were not fellow-servants, and that the company was liable for the switch conductor's negligence. Unless the switch conductor can be considered as the su-

<sup>1</sup> Oral charge to jury; not reported.

perintendent of a department, and thus within the scope of the Ross decision, (and that doubtless was the view taken by the learned judge,) it would seem that the ruling was directly in conflict with the *Randall Case*.

I do not know that I need add more, or that I can make my views any clearer. I have given this case a most careful examination. I am fully aware of the direction of modern rulings. The views expressed and the principles enunciated in the *Farwell Case* may not be obviously and unquestionably correct. It is not improbable that ere long the rule of exemption laid down in that case may be entirely overthrown. But if overthrown it should be by legislative action, and not by judicial decision. The true path for judicial walk is, as I conceive, *super antiquas vias*.

I think the motion for a new trial should be sustained.

# MACHECA and others v. UNITED STATES.<sup>1</sup>

(Circuit Court, E. D. Louisiana. January 16, 1886.)

## 1. APPELLATE JURISDICTION OF CIRCUIT COURT AT LAW.

The jurisdiction of the circuit court on writ of error from the district court, in cases at law, extends no further than to pass upon such error as may appear by the record, and when there are no bills of exception to show any ruling of the court below prejudicial to the plaintiff in error, nor assignments of error pointing out any of the proceedings in the court below as injurious to the plaintiff in error, and when the counsel point out no error, and this court sees none on inspection of the record, it conclusively follows that the writ of error should be dismissed, and the judgment of the district court affirmed.

## 2. SAME—CIRCUIT COURT NO POWER TO REVISE DISCRETION OF SECRETARY OF THE TREASURY TO REMIT PENALTIES.

The discretion vested by law in the secretary of the treasury to remit penalties, in cases where he may be satisfied no willful negligence nor fraudulent intent exists, cannot be revised or controlled by the courts.

On Motion to Dismiss.

W. S. Benedict, for plaintiff in error.

Charles Parlange, U. S. Atty., for the United States.

PARDEE, J. The facts of the case are set out in brief of plaintiff in error as follows: On the eighteenth of May, 1883, the government claimed from the defendants \$1,255 on the following cause of action: On the thirteenth of February, 1882, defendants imported from Palermo, Italy, 3,064 packages of oranges and lemons, subject to the payment of a duty of 20 per cent. The entry was not accompanied by any certificate or consular invoice. The goods were delivered on a *pro forma* invoice, with bond given to furnish consular invoice within six months. Defendants deposited the import duty, es-

<sup>1</sup> Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

timated at \$1,175.40. The bonds amounted to \$1,700, and were duly signed, and dated eighteenth of February, 1882. The duties amounted to \$2,230.44, leaving a balance due of \$1,255. The bond was forfeited, as the consular invoice was not furnished within the delay prescribed, whereby the penalty has attached. The conditions of the bonds are that defendants "shall and do, within six months from the date thereof, produce to the collector, for the time being, for the district of New Orleans, a duly-authenticated invoice of said goods, wares, and merchandise, and shall pay to the said collector the amount of duties on the appraisement of said goods, wares, and merchandise."

Defendants answer, by the general issue, and (1) that they made the bonds; (2) that they produced, within the legal delay, an authenticated invoice of said goods, the duty on the importation being properly paid; (3) that a clerical error in said invoice appeared, in not stating "that all of said merchandise was free on board, all charges included;" (4) that an additional authenticated invoice became requisite to correct said error, and was furnished by the consul to collector of customs, who declined to cancel the bond of respondents; (5) that the error occurred in the omission of the word "ditto," or words indicating the same, from their proper position on the invoice; (6) that there was no intention on the part of respondent to evade the payment of any duty.

The invoice referred to 3,061 packages of fruit, shipped on the steam-ship Peconic, which sailed on January 18, 1882, and shows the value to be, "all charges included," 14,751.80 liras. The same was sworn to by the shipper, and certified by the consul, and that the value of a lira is 19 3-10 cents. Upon these issues, the case coming on for trial, the court directed a verdict for the government, but ordered the entry of judgment to be deferred, to enable defendants to apply to the secretary of the treasury for remission. The petition for a remission was filed, and the judge made the following statement of facts:

"I make, as the statement of facts in this case, the foregoing statement of the petitioners, with the exception of the statement as to the second invoice. As to that, the fact, as appeared on the trial of the case, was that a first defective invoice was furnished by some error. The second invoice, designed to correct the error, was but a copy of the first. The third invoice was the one which was correct, and I am satisfied that it was an error of the clerk who made out the second, that he omitted the marks showing that all the items were not free on board. The second invoice was still defective, and the third invoice was correct, but received by the customs officers after the time prescribed by the statute. I am satisfied that the error was a technical, and not an intentional, mistake."

The secretary having declined to interfere, a motion was made on November 21, 1884, to enter the judgment, which was thereupon entered.

A rule for a new trial was taken, and was overruled, but with an order to stay proceedings upon said judgment for four months, to en-

able defendants to make another application to the secretary for a remission. The second application was made, and was recommended to be granted by the United States attorney in the following words:

"I recommended that the original petition for remission be granted, and for reasons then given I again recommend that the prayer of the above application be granted."

And by the judge, as follows:

"I find the facts of the case, as they appeared on the trial, to be correctly stated in the foregoing petition, and in the original petition for remission these facts were succinctly as follows: Goods were imported, some of which were not dutiable. Invoices for the goods contained this error, *i. e.*, they omitted to place a 'ditto' after some of the items in the invoices. Time, to the extent of the statutory permission, was given the importers to obtain corrected invoices. By mistake the uncorrected invoices were forwarded and received, and presented to the collector. Efforts were immediately made by the importers to obtain corrected invoices, which were successful, but after the time allotted by the statute had expired. The question submitted by the case to the honorable secretary of the treasury is whether there shall be a remission in a case where there was no intention to defraud, and where the embarrassment came from a clerical error in the invoice originally presented; where effort was honestly made to produce corrected and proper invoices, which was not till after the termination of the delay allowed by the statute, though a few days after that termination the proper invoice was obtained and presented."

On February 20, 1885, a motion was made to revoke the order staying execution, and another order was granted on March 17, 1885, staying proceedings until the delay of four months from January 7, 1885, elapsed. The secretary again declining to interfere, an appeal was taken, and allowed, and a writ of error granted, writ served, citation issued, and bond given.

The district attorney for the United States has filed a motion to dismiss the appeal, because no bond was given, and because, the suit being one at law, no appeal would lie; and he also moves to dismiss the writ of error, because there are no bills of exception nor assignments of error accompanying the same. The plaintiff in error makes no pretense that there is any appeal before the court, but does insist on his writ of error, and submits the case to the court on the facts as though the case were on appeal. The whole merits of the case are argued as though the court on writ of error could inquire into them and give relief. The jurisdiction of the court, however, extends no further than to pass upon such error as may appear by the record; and as there are no bills of exception to show any ruling of the court below prejudicial to the plaintiff in error, nor assignments of error pointing out any part of the proceedings in the court below as injurious to the plaintiff in error, and as the counsel point out no error, and this court sees none on inspection of the record, it conclusively follows that the writ of error should be dismissed, and the judgment of the district court affirmed. See *Kerr v. Clappitt*, 95 U. S. 188.

The theory of the plaintiff in error that the discretion vested by law

in the honorable secretary of the treasury to remit penalties, in cases where he may be satisfied no willful negligence nor fraudulent intent exists, can be revised or controlled by the courts, is wholly untenable. See *Walker v. Smith*, 21 How. 579; *Dorsheimer v. U.S.*, 7 Wall. 166.

Judgment affirmed.

---

*In re AUBREY and another.*<sup>1</sup>

(Circuit Court, E. D. Louisiana. December 30, 1885.)

1. BRITISH MERCHANT SHIPPING ACTS.

The acts of parliament known as the "British Merchant Shipping Acts" only include or embrace the statute law relating to British merchant ships and seamen, and the common law of Great Britain, except when altered by statute, remains still in force for the government of consuls.

2. JURISDICTION OF BRITISH CONSULS.

When a British consul, in a matter of discipline, is dealing with British subjects, on board of a British ship, courts of the United States are not called upon to look for his jurisdiction further than the instructions issued by the British foreign office.

3. REV. ST. § 728.

Section 728 of the Revised Statutes in terms embraces all consular agents whose governments give them jurisdiction, but the authority conferred upon such consular agents to sit as judge or arbitrator, mentioned in the statute, refers to, and is limited to, authority conferred by the United States. And construing section 728 with sections 4079, 4080, and 4081 of the Revised Statutes, such authority is limited to such officers of foreign nations as are entitled thereto, under treaty stipulation with the United States; and then only when such foreign country gives the same privileges to consular officers of the United States, the latter fact to be ascertained and proclaimed by the president.

4. RIGHTS OF CONSULAR OFFICERS TO SIT AS JUDGES OR ARBITRATORS.

Neither under international law, nor under the statute law of the United States, has a consular officer of a foreign government a right to sit as judge or arbitrator within our territory, and render decrees or orders affecting personal liberty, which orders or decrees the courts of the United States are authorized or required to enforce, unless the consent of the United States to such jurisdiction has been given, either by express statute or treaty stipulation.

5. COMITY AND RECIPROCITY.

Comity and reciprocity to be extended to representatives of foreign governments depends upon congress, and is not lodged within the judiciary. See 2 Op. Attys. Gen. 378, citing *The Nereide*, 9 Cranch. 889.

On Application for a Writ of *Habeas Corpus*.

*James McConnell* and *Richard De Gray*, for relators.

*A. de G. de Fonblanque*, British Consul, and *E. T. Florence*, for respondents.

PARDEE, J. The relators are held by the keeper of the parish prison under a commitment from one of the commissioners of this court, purporting to be in compliance with section 728, Rev. St., and based

<sup>1</sup> Reported by Joseph P. Hornor, Esq., of the New Orleans bar.



on a petition of her Britannic majesty's consul, alleging that by virtue of the authority conferred upon him by law as such consul, to sit as judge in a controversy between a seaman of the crew of a British ship and the captain and others of the crew thereof, he has made a decree that one John W. Dakin, Frank Aubrey, and Alfred G. Bardo, all of the British ship *Lancefield*, be sent to the United Kingdom for trial for an offense committed in the said United Kingdom, and which cannot be tried by any court of the United States or of the state of Louisiana; and concluding with a prayer that the aforesaid Dakin, Aubrey, and Bardo may be imprisoned in the prison of this parish, and held there until the aforesaid decree can be put in force, as is provided by section 728 of the Revised Statutes.

It is made to appear on the argument that the alleged offense was assault and battery committed on board a British ship in the port of Cardiff. It is probable that the commitment, and the petition on which it is based, are technically defective, the petition particularly, in not being more specific, but as new process could be at once issued, and the parties rearrested, and as the argument has been over the merits of the case as though the commitment and petition were complete, we will consider the case on its entire merits.

The relators' counsel contend that whether the offense alleged against relators was committed in or out of the United Kingdom, on the high seas or in port, the decree rendered by the consul was not made or rendered by him by virtue of an authority conferred on him by British law as such consul, to sit as judge or arbitrator in such differences as arise between captains and crews of British vessels, and they rely upon the British shipping acts.

In passing upon the question, it is immaterial to consider whether the naval court provided for by the British shipping act was the proper tribunal to try the relators for their alleged offense; whether extradition could have been resorted to, or whether the alleged consular action was proper and discreet, under the real facts in the case. The offenses within consular jurisdiction, under the British merchant shipping acts, are offenses committed out of the United Kingdom. But it appears that the said acts only include or embrace the statute law relating to British merchant ships and seamen, and that the common law of Great Britain, except when altered by statute, remains still in force for the government of consuls. See paragraph 1, Book of Instructions, *infra*. The consular jurisdiction in relation to the offenders against British law on board British ships, under both statute law and common law, has been proved in this case by the evidence of the consul, himself an English barrister at law, to be as found in a book entitled "Instructions to Consuls Relating to Matters Affecting the British Mercantile Marine," prepared by the board of trade, and approved by H. M., secretary of state for foreign affairs of date 1883. Paragraph 189 of said instructions reads as follows:

"Upon a complaint being made to the consul of any offense against British law having been committed on the high seas, or if, without complaint, he becomes aware of any serious offense having been committed on board of a British ship, he may inquire into the case upon oath, and may summon witnesses before him for that purpose, and if there is evidence which, in the opinion of the consul, is sufficient to substantiate the charge, he may send the offender to some place in the British dominion at which he can be tried," etc.

The high authority issuing and indorsing the said book of instructions should remove any doubt as to whether it is in accordance with British law. See *Dainese v. Hale*, 91 U. S. 13; and, under the paragraph cited, the jurisdiction of the consul in the case in hand seems to be clear. At all events, when the British consul in a matter of discipline, is dealing with British subjects on board of a British ship, we are not called upon to look for his jurisdiction further than the instructions issued by the British foreign office.

Conceding, therefore, the jurisdiction of the consul under British law, it remains to determine whether section 728, Rev. St., warrants the commitment issued by the commissioner in the present case. The statute was originally passed to enable our government to carry out its treaty stipulations with Prussia and other countries. See 9 St. at Large, 78. In the revision of the statutes the preamble is omitted, and the application of the statute seems to be enlarged so as to embrace the consular agents of all nations; and it does embrace all consular agents whose governments give them jurisdiction, unless the statute is so construed as to hold that the authority conferred upon such consular agents to sit as judge or arbitrator, etc., mentioned in the statute, refers to and is limited to authority conferred by the consent of the United States. Such a construction is strengthened by the original preamble to the statute, and by the fact that sections 4079, 4080, 4081, Rev. St., (which precisely provide, under limitations and restrictions looking to the protection of citizens of the United States, for enforcing the judgments, orders, and decrees of consular officers,) are limited, in terms, to such officers of foreign nations as are entitled thereto, under treaty stipulation with the United States, and then only when such foreign country gives the same privilege, to consular officers of the United States, the latter fact to be ascertained and proclaimed by the president. Unless such claimed construction shall be given as to the authority necessary under section 728, it would render sections 4079, 4080, and 4081 practically nugatory, because section 728 in itself is so broad that all action in enforcing decrees of consular officers could be had thereunder, and the restrictions and limitations provided for in other sections of the statute avoided, and besides, foreign nations with whom we have no treaty stipulations would stand on as good, if not on a better, footing than those nations to which the United States is bound by treaties of reciprocity and commerce. The rule that the several sections of the statutes should be construed together, and harmonized, if possi-

ble, also leads to the suggested construction of section 728, and we are inclined to adopt it in this case.

The facts of this case, however, as they are admitted, suggest a doubt whether either or any of the sections of the statute referred to authorize the action of the commissioner, and justify the commitment issued by him. The case, as submitted, does not show any difference between the captain and the crew of any vessel, although it is alleged as the source of the consul's jurisdiction; but rather, it shows that the relators are charged with an offense against the laws of Great Britain committed in the United Kingdom; and this goes still further to show that the construction claimed for section 728 is too broad, because under such construction, in some cases, it may be made a substitute for our extradition laws, and permit the extradition of alleged fugitives from justice without the performance of such conditions as congress has seen fit generally to guard that important matter. See section 5270, Rev. St. *et seq.*

As a matter of law, foreign consuls have no jurisdiction within the territory of the United States except by force of treaty stipulations. See Wheat. Int. Law, 217. The judicial power of a consul depends upon the treaties between the nations concerned and the laws of the nation the consul represents. *Dainese v. Hale*, 91 U. S. 13. See *The Elwine Kreplin*, 9 Blatchf. 438. Consular jurisdiction depends on the general law of nations, subsisting treaties between the two governments affected by it, and upon the obligatory force and activity of the rule of reciprocity. 2 Op. Atty. Gen. 378.

We conclude, therefore, that neither under international law, nor under the statute law of the United States, has a consular officer of a foreign government a right to sit as judge or arbitrator within our territory, and render decrees or orders affecting personal liberty, which orders or decrees the courts of the United States are authorized or required to enforce, unless the consent of the United States to such jurisdiction has been given, either by express statute or treaty stipulation.

So far as the claim is made that the relators should be held in a spirit of comity and reciprocity, we can only say that the comity and reciprocity to be extended to representatives of foreign governments depends upon congress, and is not lodged within the judiciary. See 2 Op. Atty. Gen. 378, citing *The Nereide*, 9 Cranch, 389.

The writ of *habeas corpus* should be made absolute, and the relators discharged, and it is so ordered.

After the reading of the decision, Mr. Florence, representing the British consul, asked the court to detain the prisoners for a brief period until he could consult the consul as to whether an appeal would be taken. The request was granted, but no one appearing within a reasonable time, the men were set at liberty.

BOARMAN, J., concurs.

*In re KELLY.*<sup>1</sup>

(Circuit Court, D. Minnesota. March 10, 1886.)

## 1. EXTRADITION—TREATY WITH GREAT BRITAIN—DISCHARGE OF ACCUSED FOR WANT OF TESTIMONY—SECOND ARREST AND EXAMINATION—SECOND MANDATE.

Where a party accused of crime has been arrested, had an examination before a commissioner duly appointed, and been discharged by order of the executive on the ground that the evidence was not sufficient to justify his extradition for the crime charged, he may be again arrested for the same offense, and compelled to submit to a second examination without the issuance of a second mandate by the executive.

## 2. SAME—REVIEW OF TESTIMONY ON SECOND EXAMINATION BY CIRCUIT COURT.

If the commissioner should commit the prisoner upon the second examination, and it should be apparent that he had no clearer or more convincing testimony as to the truth of the charge than was presented at the former examination, the circuit court has power to review the testimony, and correct his error.

## 3. SAME—COMPLAINT, BY WHOM PRESENTED.

It is not necessary that the attorney general, or any member of the executive department, of a foreign nation should himself make the complaint on which the accused is arrested. Any person whom he authorizes, or whom he delegates to act for that government, is a proper person to appear and file a complaint.

## 4. SAME—EVIDENCE OF AUTHORITY TO ACT FOR FOREIGN GOVERNMENT.

Whether a party making complaint is duly authorized to appear in behalf of the foreign government is a matter to be inquired into before the commissioner.

Petition for Writ of *Habeas Corpus*.

*P. A. E. Irving*, Dep. Atty. Gen. of Canada, and *C. A. Congdon*, for the prosecution.

*Thos. Ryan*, *Halvor Steenerson*, and *John W. Cathcart*, for defense.

BREWER, J. We are prepared to decide the *habeas corpus* case that was submitted to us two days ago; and I may say both Judge NELSON and myself have given the matter the careful examination which the question demands, and we agree in the conclusion which I shall announce. The petition alleges that the petitioner was arrested on the thirty-first day of August, 1885, by virtue of proceedings commenced before Mr. Spencer, a commissioner duly authorized; that testimony was heard before the commissioner, and the petitioner bound over; that the proceedings and the testimony were certified to the department at Washington, and on the fifth of February the executive issued an order to discharge him; that thereupon a new affidavit was filed charging the same offense, and in pursuance thereof the petitioner was rearrested, and is now in custody while an examination is pending before the commissioner; and it is claimed that for three reasons the petitioner should be discharged.

It is insisted, and that is really the principal question, that independent of treaty obligations no proceedings can be had in this coun-

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

try for the arrest of one charged with crime committed in another; that the whole power of the judiciary to act depends upon treaty stipulations; and that this treaty stipulation contemplates but one proceeding, which being terminated by the action of the executive adversely to the extradition exhausts all the obligation of the treaty, and puts an end to any further power of arrest. That, of course, is a question of great importance, and no case exactly in point has been presented. There have been cases in which after one preliminary examination in which defendant was discharged a second has been had, but no case in which after the one preliminary examination, and after action by the executive department refusing to extradite under such proceeding, there have been subsequent proceedings for the same offense, and under the same treaty obligation. That, of course, compels an examination of the treaty to see what its purpose and scope is. Article 10 is as follows:

"It is agreed that the United States and her Britannic majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively, made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed in the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other."

What is the main purpose and scope of that contract obligation between the two nations? Is it limited to a mere contract as to the manner in which the alleged criminality shall be investigated, or is it, on the other hand, a contract that the alleged fugitive shall be extradited, leaving the details by which the criminality is to be ascertained to the authorities of the respective governments? It seems to us that the latter is the true intent and purpose; that the alleged fugitive, if his criminality is sufficiently ascertained, shall be surrendered. This is in furtherance of what must be conceded to be a just policy, and it is a policy that has gradually become recognized all over the civilized world; that while this government opens its doors to all citizens of every nation, it does not mean that this country shall become an asylum for the criminals of those nations; that it is for the interest of every nation, and of every individual, that no criminal shall anywhere find an escape from the pursuing hands of justice. It is not a contract that one government shall furnish to other governments one opportunity for investigating,—one time for inquiry,—but that it will surrender the alleged criminal if his criminality shall be clearly ascertained. It is conceded law that where one is arrested for a local offense, and a preliminary examination fails for any reason,—such as a defect in the jurisdiction of the examining magistrate, lack of evidence, informality of papers,—that is no bar to a second proceeding.

We do not assent, however, to the proposition which was suggested that these preliminary examinations for local offenses may be con-

tinued indefinitely. We do not believe it is true that a man can be subjected time after time to the annoyance, vexation, and harass of repeated examinations. And while it may be technically true that one examination is no bar to another, yet whenever it becomes apparent that the examinations are instituted and carried on not with a view to the furtherance of public justice, but with a view of enforcing personal spite and private malice, no doubt it is in the power of the court at any time to interfere and stop them. It is unnecessary to wait until the close of an examination, and then, if the accused is bound over, to interfere; but whenever, in a case of a preliminary examination for a local offense, it is apparent that the same is carried on for the purpose of gratifying personal spite, or for the annoyance and vexation of the party arrested, we think a court has power to take hold of it with a strong hand; and so in cases where proceedings are instituted under and by virtue of treaty stipulations, and it is apparent that the arrest is simply to gratify the personal malice of an individual, or of the authorities of a foreign nation, I have no question as to the power and duty of the court to lay strong hands upon those proceedings, and to stop them altogether. But the mere fact that one examination has failed by reason of a lack of sufficient testimony is no bar in law to a second, and the court ought not to interfere until it appears that the second is instituted for the purpose of private malice. We all know how often, in the administration of justice, it happens that a preliminary examination fails. The testimony first presented is insufficient; the officer is found not to have jurisdiction; the complaint is technically defective, and the proceedings fail. It would be an outrage upon justice if for any such reason as that there could be no further prosecution of one charged with crime, and equally, in extradition cases, a violation of the spirit, if not of the letter, of the treaty. It seems to us that it is as if this government should say to a foreign nation: "True, we have agreed by solemn compact to return to you a man who is charged by a person duly authorized with having committed a crime, if the evidence of his crime is satisfactory, but in this instance we will not surrender him simply because on the first presentation of your case you have failed to make out a sufficient showing."

We do not question the fact that an extradition requires the assent of both the judicial and the executive, and that the executive is the final tribunal to determine it; and whenever it appears that the executive has said that the alleged offense does not come within the scope of the extradition treaty, or when the executive says he is satisfied that the prosecution is instituted for political reasons, or to gratify private malice, and therefore the offender shall not be extradited, that concludes all further inquiry by the court. But when it is determined by the executive, as in this case, merely that the testimony presented is insufficient, we think it leaves it as in other cases of preliminary examination, and there can be a second inquiry. The

letter from the department, which is in the handwriting of some official, and signed by the secretary of state, says: "He therefore directs you to discharge Edward Kelly from further custody under the commissioner's commitment." So far it is in the handwriting of the clerk; but the secretary adds, in his own handwriting, "In these proceedings," as though he would carry the intimation that as far as the testimony was then presented,—as far as the proceedings then disclosed,—the showing was insufficient, but did not intend to foreclose further inquiry or examination.

It is secondly urged that no mandate has been issued, and that a mandate from the executive is necessary before the judicial authorities can act. Whether a mandate is necessary at all is one of those disputed questions which cannot be said as yet to have been determined. There has been read a case—indeed the only case, I think—in which the question has been presented to the supreme court of the United States. In that case four of the justices held that no mandate was necessary. Three held that it was, but all agreed that the court had no jurisdiction in that case, so that what was said was mere *dictum* on both sides, and there has been as yet no authoritative determination by that court as to the necessity of a mandate. The extradition law may, perhaps, suggest that no mandate is necessary; for it says:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint, made under oath, charging any person found within the limits of any state, district, or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered."

Not "may, upon complaint based upon a mandate, or after the issue of a mandate," but may "proceed upon complaint made." Yet, assuming that a mandate is necessary, what does that mandate mean? It means simply that the executive department of the government authorizes the proceeding before the judicial department. A mandate in this case was issued. I do not understand that a mandate which puts in motion the action of the judicial department exhausts itself and becomes a dead letter whenever any proceedings had by that department fail. All that the mandate contemplates, and is intended to provide for, is a recognition by the executive that this is a case which comes within the scope of the treaty, and calls for judicial investigation. The question is therefore presented to the judiciary for examination. It remains operative until recalled by the executive, or he signifies in some way that its functions are exhausted. Here the

letter from the department to the marshal indicates only that the testimony before the commissioner is insufficient.

The final proposition made is that the complaint is not presented by the proper person. It is sworn to by ———, and in his affidavit he swears he is a citizen and a resident of the province of British Columbia, and acts herein for and in behalf of and pursuant to instructions of the government of the Dominion of Canada and the attorney general of British Columbia. The treaty provides that "upon mutual requisitions by them, or their ministers, officers, or authorities." I think that under the treaty it is not necessary that the attorney general, or any member of the executive department of a foreign nation, should himself come. Any person whom he authorizes, or whom he delegates to act for that government, is a proper person, within its scope, to appear and file a complaint. Generally it would be an unnecessarily severe construction of that treaty to require any member of the executive department of a foreign nation to appear in person, and thus take him away unnecessarily from the discharge of those duties which we may fairly presume devolve upon him at home. It is enough if any person duly authorized appear in behalf of that government and make complaint. Of course, the question of fact is not settled. That is a matter to be inquired into before the commissioner,—as to whether the party making complaint is thus duly accredited. If it should appear that he was not; that he was simply a private citizen, pursuing this matter for private purposes,—of course the commissioner would act accordingly.

We have given this matter a very careful consideration, owing to the fact that we deem it of importance, and that no previous case of this kind has arisen. The petition for *habeas corpus* must be refused, and the petitioner remanded into the custody of the marshal.

I would add that we both are of the opinion that if the commissioner should commit upon this examination, and it should be apparent that he had no clearer or more convincing testimony as to the truth of the charge than was presented before, the court has power to review the testimony, and say that the executive having once passed upon it, the commissioner is bound to follow it; and if he does not, the court will correct his error.



## UNITED STATES v. HAYNES.

(Circuit Court, D. Massachusetts. March 24, 1886.)

CRIMINAL LAW—REMITTING INDICTMENT TO DISTRICT COURT—Rev. St. § 1037.

After conviction in the district court, the indictment cannot be lawfully remitted to the circuit court, under Rev. St. § 1037.

Motion in Arrest of Judgment.

C. Almy, Jr., Asst. U. S. Atty, for the United States.

B. F. Butler and H. Dunham, for defendant.

COLT, J. This indictment was remitted from the district to the circuit court, under section 1037, Rev. St., on motion of the district attorney, and after conviction in the district court. Upon the present motion in arrest of judgment the question is raised whether, after conviction in the district court, the indictment can be lawfully remitted to the circuit court under section 1037. There are serious objections to the allowance of a remission at this stage of the case. The defendant, if entitled to a new trial, has a right to a re-examination of the facts by the court where the issues were tried, and this court has no power to re-examine the facts. The seventh amendment to the constitution provides as follows: "And no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to common law." In the construction of this provision in *Parsons v. Bedford*, 3 Pet. 433, Mr. Justice STORY says:

"This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings."

This language is cited with approval in *The Justices v. Murray*, 9 Wall. 274. We do not think section 1037 should be construed so broadly as to permit the remission of an indictment to another court after conviction, and so deprive the defendant of any right he may have to a new trial by the court where the issue was tried.

The motion in arrest of judgment is sustained.

**FORSCHNER v. BAUMGARTEN and another.<sup>1</sup>***(Circuit Court, S. D. New York. March 16, 1886.)***1. PATENTS FOR INVENTIONS—GLASS SCALE-PANS FOR WEIGHING.**

Letters patent No. 214,643, of April 22, 1879, to Charles Forscher, for an improvement in scale-pans for weighing, are void for want of patentable novelty in the invention.

**2. SAME.**

There is no invention in making a scale-pan of glass, with glass lugs made integral therewith, and suspending it by branching metal bows passing through holes in said lugs, glass and glazed porcelain scale-pans being old, and metallic scale-pans suspended on such branching bows being old.

**3. PLEADINGS—EVIDENCE—PRIOR USE AND PRIOR PUBLICATIONS.**

Certain catalogues, showing features of the patent sued on, were offered in evidence, although not set up in the answer. *Held*, that these circulars should be considered as evidence in support of allegations of prior knowledge and use by others, properly made in the answer, but not as prior publications describing the invention, and constituting anticipations, of themselves, within the statute.

In Equity.

*R. B. McMaster*, for plaintiff.

*Louis C. Raeger*, for defendants.

**WHEELER, J.** This suit is brought upon patent No. 214,643, dated April 22, 1879, and granted to the plaintiff for an improvement in scale-pans for weighing. The specification sets forth the scale-pans as "made entire of glass," with strong lugs, one on each side, opposite each other, with two holes in each for a suspending bow of metal, divided at each end into two branches, to be put through the two holes in each lug, and fastened there with nuts. The claim is for a scale-dish formed with extended lugs, each having two holes through it, in combination with double suspending bows passing down through the holes and secured beneath the same, substantially as specified. One of the defenses set up is want of patentable novelty.

A scale-dish of glazed porcelain is shown to have been described in the *Mechanic's Magazine*, a printed publication, in 1836, volume 25, p. 23, as in use by a Mr. Juggins, a dealer in butter and cheese, in London; and the forming of scale-pans of "glass, or it may be porcelain," is set forth as part of the invention of Edward Dowling in his specification for an English patent, April 14, 1859. Metallic scale-pans, suspended on branching bows like those of plaintiff's patent, are shown to have been made, and on sale in this country, prior to the plaintiff's invention. This fact is shown, in part, by catalogues not set up in the answer, and objected to for that reason. They are considered, however, as evidence in support of allegations of prior knowledge and use by others properly made in the answer, and not as prior publications describing the invention, and constituting an-

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

ticipations, within the statute, of themselves. They appear to be properly in evidence for this purpose. The description of the scale-pans of Juggins and of Dowling do not show the modes of attachment to the bales. The metallic pans suspended on branching bows are shown to have been attached by lugs soldered or riveted to the dishes through which the branches of the bows are put, and fastened with nuts. These bows, and the fastenings on them, are the same as those of the plaintiff's patent. The only difference between the lugs of the patent and those in use before is that those of the patent are extensions of the dish, while the others are fastened to the dish of the same material; and those of the patent are broad enough to include the two holes for the branches of the bow on each side, in each lug, while the others are single for each branch of the bow. The office of the lugs is merely to suspend the dish, and the usefulness and operation of the dish are not altered by the difference between a single lug large enough for the two holes and single lugs for each, for the two branches of the bow. The plaintiff had only to suspend a known glass dish by a known branching bow. An obvious method of doing that was by putting the branches of the bow through holes in the edges of the dish, or extensions of the edges. This is a well-known way of suspension which any mechanic skilled in working the materials would use or might use. If it was a wooden dish or a metallic one, a mechanic who was shown the dish, and the bale with branches and nuts for the ends of the branches, and who was put to suspend the dish on the bale, if it was wooden, and he had skill for making holes through wood, or it was iron, and he had skill for making holes through that, would, readily, by his mechanical skill, make the holes, and put the branches of the bale through, and put on the nuts, and the dish would be suspended. And likewise, the dish being glass, a worker in glass, skilled to make holes in the edges of the dish through the glass, or to make a dish with the holes, would suspend it in the same manner. The plaintiff merely combined a known glass dish, with a known branching bow in substantially the same manner in which a metallic dish had been combined before, the difference being merely formal and mechanical. This does not appear to amount to such invention as to be sufficient to support a patent. *Hotchkiss v. Greenwood*, 11 How. 248; *Pearce v. Mulford*, 102 U. S. 112; *Hollister v. Benedict Manuf'g Co.*, 113 U. S. 59; S. C. 5 Sup. Ct. Rep. 717. The result is that the patent must be adjudged invalid.

Let a decree be entered that the patent is invalid, and the bill dismissed, with costs.

THE MINNIE.<sup>1</sup>

## THE DORIS.

## GEDNEY and others v. THE MINNIE and others.

(*District Court, D. Connecticut.* February 13, 1886.)

## COLLISION—SUNKEN VESSEL RAISED AND REPAIRED—MEASURE OF DAMAGES.

When a vessel sunk in a collision is subsequently raised, and permanent repairs are both practicable and proper, but she was put into a better condition than before the disaster, the owners, if acting with promptness, are entitled to recover the cost of raising the vessel and cargo, and of necessary temporary repairs thereto, as well as the amount that it would have cost them to have put the vessel, her furniture, and fittings into as good and serviceable condition as she was before the sinking, and to a reasonable sum as demurrage for the time consumed, and also to compensation for any damage to the cargo, and to the gross freight thereon, less the charges which would have been necessarily incurred in earning it. The crew should be compensated for the loss of personal effects, but the sum awarded should be less than the cost price of the articles lost.

## In Admiralty.

The owners as well as the crew of a vessel sunk in a collision filed a libel against the respondents. The court held the respondents to be in fault, and ordered a reference to a commissioner to assess damages. The vessel was promptly raised, and some money was expended in temporary repairs. Extensive permanent repairs and alterations were made, and she was put in a better condition than before the disaster, so that the amount expended was not a criterion of the actual injury. There was an insurance upon the hull of the vessel, which was paid, and the proceedings on the part of the owners of the vessel were virtually proceedings for the benefit of the underwriters. The joinder of the crew in the libel was for the purpose of recovering damages for the loss of personal effects. The commissioner in assessing damages allowed the libelants the cost of raising the vessel, and also the cost of temporary repairs. He further allowed them the sum that it would have cost them to put her into as good and serviceable condition as she was before the disaster, and also what it would have cost them to have furnished and refitted her over and above the amount and value of the furniture saved. The commissioner likewise allowed demurrage for the time that it would have taken to have refitted her, the cost of raising her cargo, the damage thereto, the amount of freight earned at the time of the disaster, and the value of the personal effects of the crew, estimating the latter on the basis of the actual cost required to supply the places of the articles lost. The owners of the sunken vessel, the libelants, excepted because the commissioner did not allow them full freight. The

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

owners of the Minnie excepted,—*First*, because the commissioner allowed \$352.55 for temporary necessary repairs; *second*, because the commissioner allowed \$7,500 as the sum that it would have cost the libelants to have put the vessel into as good condition as she was before sinking; *third*, because the commissioner allowed \$1,000 as the sum that it would have cost them to have refurnished and refitted her, over and above the furniture and fittings saved; *fourth*, because the commissioner allowed the sum of \$288.51 as damages to the crew for the loss of personal effects; *fifth*, because the commissioner's report makes no finding of the market value of the vessel immediately prior to her sinking, or the practicability of making permanent repairs. The owners of the Doris excepted to the commissioner's report—*First*, because the libelants' suit being virtually for the benefit of the underwriters, the damages awarded should be reduced by the amounts heretofore received by the underwriters as premiums; *second*, because the insured virtually abandoned the vessel as a total loss, and were paid accordingly, and that it was error for the commissioner to allow, not only the amount the insurance companies paid out, but, in addition, such sums as it was estimated it would have cost for repairs in order to put her in as good condition as she was in before she was sunk; *third*, because the commissioner erred in allowing as damages such sums as would be required to buy a new boat or new clothes, as neither the boat nor the clothes were new.

*Butler, Stillman & Hubbard*, for libelants.

*Carpenter & Mosher*, for insurance companies.

*Wheeler, Peckham & Dixon*, for the Doris.

*Samuel Park*, for the Minnie.

SHIPMAN, J. The first, second, and third exceptions of the Thames Tow-boat Company, the owner of the Minnie, and one of the claimants, to the commissioner's report, in allowing \$352.55, \$7,500, and \$1,000, are overruled, and the findings of the commissioner are sustained.

The fifth exception of the said claimant, and the second exception of the Providence & Stonington Steam-ship Company, the owner of the Doris, and another claimant, are overruled. These exceptions proceed upon the erroneous theory that the Van Santvoord was a total loss, whereas she was worth, when raised, \$1,650, was delivered to the owner, who immediately repaired and refitted her.

The practicability and propriety of making permanent repairs were evident. The first exception of the said owner of the Doris is overruled.

The fourth exception of the owner of the Minnie is sustained, and the third exception of the owner of the Doris is sustained in part. The commissioner placed, in my opinion, too high a value upon the personal effects of the master and crew, and should have deducted somewhat from the cost price. I allow: For the personal effects of

Theron G. Post, \$103.70; for the personal effects of Henry Post, \$77.54; for the personal effects of James Gallagher, \$33.97.

The exception of the libelants to the non-allowance of \$192.50 for freight is sustained in part. The freight earned, at the time of the accident, being the gross freight, less the charges which would have been necessarily incurred in earning the same, exceeded the sum allowed by the commissioner. There should be allowed the sum of \$160.

Let a decree be entered in accordance with the commissioner's report, as herein modified.

---

### THE MARY LORD.<sup>1</sup>

CARSON v. THE MARY LORD.

(District Court, D. Maine. June 16, 1885.)

#### COLLISION—SAILING VESSELS—ABSENCE OF SIDE LIGHT.

The schooner R., while sailing on a course E.  $\frac{1}{2}$  N., collided with the schooner M. L., the course of the latter vessel being W. Each vessel was making about seven knots. The wind was free and from N. The M. L. struck the R. on her starboard side, just forward of the mainmast. Just before the collision the helm of the M. L. was ported. This was the only material change of course made by her. The R. luffed shortly after first sighting the M. L.; the latter vessel being at the time at a considerable distance, and bearing about one-half a point on her starboard bow. The R. subsequently luffed a second time, and was up in the wind at the time of the collision. The red light of the M. L. was not seen by the R. at any time, and its absence induced the R. to suppose that the M. L. was passing across her course to the S. of W., instead of on a line parallel with it. *Held*, that the evidence indicates that the red light of the M. L. was not burning, and that its absence misled and deceived the R., and was the cause of the collision; that, as the green light only of the M. L. was burning, it was reasonable for the R. to suppose that the M. L. was a crossing vessel, and the maneuver of the former, under these circumstances, was justifiable.

In Admiralty.

*Strout, Gage & Strout* and *Edward S. Dodge*, for libellant.

*Strout & Holmes*, for respondents.

WEBB, J. On the morning of November 8, 1883, between 12 and 1 o'clock, at a point about five miles south of Watch Hill Light, in Block Island channel, a collision occurred between the schooner Regina and the Mary Lord. The Regina, which was loaded with coal, and bound from New York to St. John, New Brunswick, was so injured that she instantly sunk. The Mary Lord, having on board a cargo of spruce lumber under and on deck, filled, but from the nature of her cargo was kept afloat, and the weather being favorable was

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

got into New London. The parties agree that the lights of the Regina were set and burning brightly; that the night was clear, the sea smooth, and the wind fresh; that each vessel was running from seven to eight knots an hour; that the Mary Lord struck the Regina on her starboard side, just forward of the mainmast, coming into her at about a right angle, and sunk her. Upon all other matters, there is much contradictory evidence. The time of the collision is stated variously at from 10 or 15 minutes to 30 minutes or more past 12 o'clock. The witnesses for the libellant give the wind at the time as N., while the claimants' witnesses say it was N. W. by N. or N. W. Nearly all the witnesses give the wind as N., or with a very little westerly variation from that point till after 12 o'clock. Capt. Walls, master of the schooner *Ida Belle Torry*, who hailed the Mary Lord, and inquired if she needed assistance, sometime after the collision, says that up to about 15 minutes past 12 he had the wind from N., when it changed suddenly to N. W. The signal station record, kept at Block island, states the wind N. all of the 7th, and till 7 A. M. of the 8th. In view of all the evidence, the conclusion seems to me unavoidable that for some time later than 12 o'clock the wind was N. The course of the Regina was E.  $\frac{1}{2}$  N.; that of the Mary Lord was W.

The precise time of the collision is somewhat uncertain. The direct evidence in regard to it is only the judgment of the witnesses. No one pretends to have noted the time by any clock. But, taking into consideration the incidents on board both vessels, and the time of Capt. Walls' hailing and offering assistance, I think it quite certain it could not have been later than 15 minutes past 12. I am also satisfied that both vessels were then, and for considerable time before had been, running free with the wind from N. They were thus approaching each other, end on, or nearly end on, and the helm of each should have been put to port, under the requirement of the eighteenth sailing rule. But this duty rests only on those who know or ought to know the way the vessels are approaching. The lights directed by statute are for the purpose of giving to the vigilant and attentive necessary information to govern them in the navigation of their own vessel. The absence of lights will not excuse neglect of duty, when, by the exercise of proper care, the position and direction of an approaching vessel might otherwise be seasonably known. In this case the master of the Regina was on the lookout, and an experienced and competent seaman had the wheel.

The testimony of the lookout is that he first discovered the green light of the Mary Lord about one-half a point on his starboard bow, and about half a mile distant, and that at once he passed over to leeward side, and took his position where he could carefully watch it, and never removed his eyes from it till the collision; that at no time was any red light visible on the Mary Lord. The man at the wheel says that very soon after he had taken it the captain gave him the order to luff, and he put his helm to starboard, and the schooner

came up a point or more, and then, without orders, he steadied, and soon undertook to return to his course, but was at once directed not to let the vessel fall off, and to keep his luff a little more. The master testifies that he gave these orders in consequence of seeing the green light to the leeward, and that his own green light might be opened more to the other vessel, which he supposed—and was warranted in supposing if he saw the light as he testifies—was passing across his course to S. of W. He thought that the green light he was watching apparently approached him more than it ought, and gave the second order to luff in consequence; that he did not and could not discern the vessel bearing this green light until she was very near him, and heading directly on him, when he gave the order to hard down the wheel, which was at once obeyed, and the Regina shot up into the wind and her sails lifted. In his opinion the vessels would still have gone clear, but that, at the moment when his helm was put hard a-starboard, the helm of the Mary Lord was ported, and she at the same time came up, following the Regina, and striking her as described. It is evident, on the assumption that the light of the Mary Lord was seen as thus stated, the orders on board the Regina were correct.

The lookout of the Mary Lord, at the time of the collision, was on his first voyage, and had been on board only two or three days. His previous experience was entirely foreign to nautical affairs. He and the second mate, who is a son of the master, both say that they took pains to look at their own lights every time they stepped from one side of the deck to the other, and that both were constantly burning up to and after the collision. This extreme vigilance in regard to their lights, on the part of an experienced seaman, as well as on that of a person at sea for the first time in his life, is not credible. Moreover, if the lights were placed and protected by screens, as they ought to have been, it is questionable if either of these witnesses could have seen them as they have testified. It is admitted that that red light had, once at least, on a former occasion, gone out. It is also proved that on this night, some time after the collision, it was out, and was taken into the cabin and relighted. One of the crew of the Mary Lord testifies that, with a heavy wind and slack rigging, it would go out, and admits that he told one of the libelant's witnesses that it had sprung open. Nearly all the witnesses of the claimants admit, that very soon after the collision, some say as soon as he got on their vessel, the captain of the Regina charged that they had no red light, and though several say they went to look, and found it burning, not one of them called the complaining master's attention to the fact.

On the other side, the master of the Regina swears positively that it was not visible to him at any time before the collision, although he was on the lookout at a proper station; that after the collision, and when on board the Mary Lord, he went forward, stepped up on the forerigging so as to look, at a distance of not more than two feet, upon



the lantern which was sitting properly in its box, and no light was then burning. The mate of the Regina, who was filling his pipe in the cabin, close by the door, says he heard the order "hard a-starboard," and instantly stepped to the deck, and looked at the Mary Lord as she was coming into them, and especially looked for the light, and could see none. All the navigation of the Regina was inconsistent with any theory of that light being visible. The testimony of some of the claimants' witnesses is weakened materially by conflicting statements. Evidence is offered that the man at the wheel has given an account of the collision totally different from that which he has given as a witness. Another volunteered statements in writing quite in harmony with the statements of the libellant's witnesses, and at the trial declared those statements to be false, and to have been given under the prompting of malice and revenge. Witnesses whose testimony is thus attacked, giving evidence in itself that conflicts with probability, and is also directly contradicted by others who are unimpeached, cannot be taken as safe guides.

That the red light of the Mary Lord was not burning, I think is established, and its absence explains why the lookout of the Regina did not discover her before she had approached within half a mile on a night admitted to have been clear starlight. The courses on which the vessels were sailing—one E.  $\frac{1}{2}$  N., and the other due W.—show that for a time not long before the collision the Regina was slightly to the leeward of the Mary Lord, and all that time was in no position to see the green light, which would open to her only when the lines of approach crossed. The witnesses from the crew of the Mary Lord say they saw the Regina at the leeward, showing her red light, from one to two miles distant, and then they saw both of her lights, which is as they should have been seen. It is equally plain that when the green light was first seen by the master of the Regina, his schooner had got to the windward of the other, and from that moment he took all the precautions incumbent on him, unless it appears that he saw, or ought to have seen, the Mary Lord, notwithstanding she had no red light, in season to take further measures to avoid danger.

He testifies that he kept constant watch of the green light, from the instant he described it till the collision; that, as soon as he saw it, he gave orders that would carry him further away, out of danger; that when he found that the light still seemed to draw near instead of receding, he repeated the order for further divergence; that as soon as he could discern the vessel coming towards him, so as to know how she was approaching, he ordered his wheel hard down. The man at the wheel corroborates these statements, and says the orders were strictly obeyed. Both testified that they heard on board the Mary Lord the order "hard a-port." There is no reason for doubting these statements in respect to what took place on the Regina.

The mate of the Mary Lord and the man at her wheel deny that her wheel was ported, and that any order to port was given. They

are positive in their statements that the wheel was not moved from 12 o'clock to the time of the collision. They say they were running close-hauled all the time, with the wind N. W. by N. In these and many other particulars I do not find them trustworthy. All the indications are that, with or without orders, the helm of the *Mary Lord* was ported immediately before the collision. It is not improbable that it was put to port slightly when the light of the *Regina* was first seen. The want of a red light was primarily the whole cause of the collision. The other vessel was deceived and misled by this failure to show that light. The course adopted by those who only saw a green light was without fault. That course is confirmed by the evidence of the opposing witnesses, even when they affirm that their red light was burning. That the collision was finally brought about by the wheel of the *Mary Lord* being put to port I cannot doubt. The fault, then, being wholly on the part of the vessel libeled, there must be a decree accordingly.

Decree for libellant; an assessor to be appointed, to determine amount of damage.<sup>1</sup>

---

### THE ALABAMA.<sup>2</sup>

#### HICKS and others v. THE ALABAMA.

(District Court, S. D. Alabama. February 23, 1886.)

**COLLISION—DERRICK-BOAT MOORED TO A PIER—ABSENCE OF LIGHT—RULE 12 (SECTION 4233, REV. ST.) CONSIDERED—MISTAKEN MOVEMENT NOT NECESSARILY A FAULT IN LAW.**

A derrick-boat was run into by a passing steamer. The latter vessel was elsewhere than she supposed herself to be at the time of the collision; but this error arose from the absence of any light on the derrick-boat or the pier, and not from negligence on the part of the steamer. The derrick-boat was moored to a pier, the location of which was out of the mid-channel and of the course usually pursued by passing vessels. *Held*, that a vessel cannot be said to be in fault solely on the ground that at the time of a collision she was elsewhere than she supposed herself to be. A mistake in the movements of a vessel does not necessarily imply fault as a matter of law. The absence of any light on either the pier or the derrick-boat was a violation of the statute. Skilled navigators do not always follow the main channel, especially at high water; and the statute rendering it obligatory upon the derrick-boat to carry a light, she cannot escape liability by proving that she was not in mid-channel, or that she was out of the usual course of passing vessels. *The Gipsy*, 19 How. 56, distinguished.

In Admiralty.

*Overall & Bestor* and *W. R. Nelson*, for libellants.

*George M. Duskin*, for respondent.

<sup>1</sup>Appealed to the circuit court.

<sup>2</sup>Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

BRUCE, J. On Monday, the nineteenth day of January, 1885, the steam-boat Alabama navigating the waters of the Alabama river, in coming down the river on the south side of the channel opposite the city of Selma, ran against a derrick-boat laying, at the time, on the south side of pier No. 4, that being the south pier of a bridge then in process of construction across the river at that point, by which collision the derrick-boat was sunk, and the property upon the boat, consisting of a steam-engine, derrick, and tools, were lost, and the libelants, whose property was thus destroyed, bring this suit for damages, charging that the collision resulted from the negligent, careless, and unskillful navigating of the steam-boat.

There is some conflict of testimony as to the time when the collision occurred, but the weight of the testimony is that it was about dusk, if not fully dark. At any rate, it was after sun-down, and this suggests the question as to the use of signal or danger lights. There was no light on the derrick-boat or on the pier No. 4 at the time, and indeed there was no light on any of the piers, and there was no person on watch on the derrick-boat at the time of the collision. The hands had left shortly before, and the lights usually exposed had not yet been put up. The question, then, arises whether the libelants were required to have and maintain lights upon the derrick-boat, used, as it was at the time, on the construction of pier No. 4. Rule 12, (section 4233 of the Revised Statutes of the United States, c. 5,) under the head of "Navigation," provides:

"Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft navigating any bay, harbor, or river by hand-power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam vessels."

And rule 2 in the same chapter provides:

"The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise."

It is claimed that the derrick-boat in question is not within the terms of the statute; that it was not anchored or moored in or near the channel of the river; and that, therefore, there was no obligation upon libelants to use lights as provided in this statute. The evidence shows the base of pier No. 4 is at the low-water mark, so that at a low stage of water, or perhaps even at an ordinary stage of water, a steam-boat could not pass on the south side of pier No. 4. At this time however, the river was high, and there was from 75 to 100 feet width of water between the pier No. 4 and the south bank of the river, so that a boat could pass, and in point of fact the steam-boat Alabama did pass, on that occasion, between pier No. 4 and the south bank of the river, striking her stern, however, against the south side

of the pier, and inflicting some damage upon her, though that may have resulted from striking the derrick-boat.

Testimony is cumulated upon the point that it was not usual for steamers navigating the river at that point to pass so far to the south side of the river, and it is clear that the usual course of boats was north of the line pursued by the Alabama at the time in question, and the claim of the libelants is that the derrick-boat was not in or near the channel of the river, and that she was moored at a point where she had no reason to expect a boat, and where the colliding steam-boat had no occasion to go, and therefore lights were not required. The derrick-boat had lines out to the shore on the south bank of the river, but she was moored to the pier, and not to the shore, and therefore the case does not fall within the rule upon which the case of *The Gipsy*, 9 How. 56, was decided, where the flat was moored to the bank of the river in a recess below the landing, and where it is said flat-boats might be expected, and where the steamer had no occasion to go. That the derrick-boat was moored at a point distant from the channel of the river, meaning the point where the main current of the water passed, is correct; but that the channel of the main current of the water in a river is to be held to be the channel of a river, in the sense of the admiralty, cannot be maintained. Skilled navigators of rivers, especially in high water, do not always follow the main current of the water around bends in the river, but run the "points," I believe it is called, and so shorten distance and avoid currents. The testimony shows that the steam-boat had taken on freight at a warehouse between one-half and one-quarter of a mile above the pier, and from that point backed out to the south portion of the river, and then headed down the river with no purpose of again stopping at Selma. Now, to say that, under such circumstances, a boat of the kind this derrick-boat was, might be moored in the river where those in charge of her might deem that a steam-boat would have no occasion to go, and therefore not be required to expose lights, is a proposition which I think cannot be maintained. I find the fact to be that the derrick-boat was moored where she should have had lights exposed as required by the statute, and, under such finding, the law is—that where there has been a breach of the statutory regulation as to lights exhibited by a vessel, she is *prima facie* in the wrong, and the burden of proof is on her to show that the want of lights did not contribute to the collision. Henry, Adm. 241, and authorities there cited; *The Oliver*, 22 Fed. Rep. 848.

But it is claimed that the cause of the collision was not the want of lights upon the derrick-boat, for that the pier was seen by witnesses who were on the shore at the time, and that the pilot on watch at the time was at fault, and did not know his position in the river, as he was required to know it, and that from carelessness or unskillfulness, or both, he was out of his course, and so ran down the derrick-boat. The court must be governed by the testimony of the officers

of the boat who were on watch as to what objects were visible or not visible at the time, rather than by the testimony of witnesses who were on the shore; and the court cannot presume that the pilot of the steam-boat Alabama had any purpose other than to clear pier No. 4, and at this point we have the testimony of the pilot himself who states that he aimed to pass on the north side of pier No. 4, but that he did not see it until he was so close to it that he could not pass, as he intended, on the north side; and that after an effort to stop his boat, he attempted to pass the pier on the south side and did so, striking the derrick-boat, which he says he did not see until he was nearly upon it. He gives as a reason why he sought to pass so near the north side of the pier that the current makes north at that point, and he held his boat south as far as he could so as to be sure to clear pier No. 3.

It is not claimed that the pilot at the wheel was not a competent pilot, or, indeed, that the steam-boat was not well officered and had a proper lookout at the time, and it may be admitted that the pilot was at fault in his knowledge as to his location in the stream; that he was, in point of fact, just before the collision took place, further to the south than he thought or intended to be,—he says as much,—but a mistake in the movement of a vessel does not necessarily imply fault as matter of law. Officers are required to have skill, and exercise good judgment, but they need not be infallible. *Henry, Adm. 241; The Pennsylvania, 19 Wall. 126.* The importance of the rule in regard to lights finds its illustration in this case; for it is clear that, if lights had been displayed so as to show the location of the derrick-boat and the pier, the steam-boat would have safely passed on the north side of the pier, and would have prevented the pilot from falling into the error which made it necessary for him to attempt passing on the south instead of the north side of the pier, as he intended. Instead of finding that the failure of the derrick-boat to display lights had nothing to do with the collision, I find it to have been the proximate cause of it.

But it is claimed that the officers of the steam-boat had actual notice, and knew that the derrick-boat was at that pier, because the steam-boat was at the wharf at Selma during a part or all of Sunday and all of Monday until sun-down, while work upon the pier in question was going on at a point in the river about opposite to where the steam-boat was laying, and near to her. Of course, the officers of the steam-boat knew of the construction of the piers of the bridge, and they might well infer, if they did not actually know, that derrick-boats were in use in the construction of the piers; but they also knew that derrick-boats were water-craft, and liable to be moved from point to point, and the evidence fails to show that the officers of the Alabama actually knew that the derrick-boat was moored at that particular place where she was struck by the Alabama.

The decree is for the respondent, and the libel is dismissed, with costs.

*In re* THE LUCKENBACK.<sup>1</sup>

(District Court, S. D. New York. March 9, 1886.)

**SHIPPING—LIMITATION OF LIABILITY—PRACTICE—FILING PETITION—PROPER COURT—ADMIRALTY RULE 57.**

A libel having been filed for damages against the tug L. in the district court of the United States for the Eastern district of New York, upon which, after judgment against the tug, an appeal was taken by the owners to the circuit and thence to the supreme court; and other suits for damages arising out of the same disaster having been brought against the owners in the state courts in the Southern district of New York,—a petition to limit liability was filed by the owners in the district court for the Southern district during the pendency of the appeal in the libel suit. On motion to dismiss the proceedings, as having been brought in the wrong district, *held*, that the petition should have been filed in the district court of the Eastern district, in which the original libel was filed, and the motion to dismiss was granted.

**In Admiralty.**

*Butler, Stillman & Hubbard, (Mr. Mynderse,)* for petitioners.  
*Goodrich, Deady & Platt,* opposed.

BROWN, J. The steam-tug E. Luckenback having been heretofore libeled in the Eastern district on a claim of damages for negligence, she was adjudged liable, and a decree entered against her. Upon appeal, that decree was affirmed in the circuit court, and from the decree of affirmance a further appeal was taken to the supreme court, where that appeal is now pending. Other suits arising out of the same disaster have been commenced in the state courts in this district against the owners of the tug; and the owners have now filed in this court a petition for a limitation of liability. A motion to dismiss the petition has been made, under the fifty-seventh rule of the supreme court in admiralty, upon the ground that the petition is filed in the wrong district, and should have been filed in the Eastern district. The fifty-seventh rule provides that "the said libel or petition shall be filed, and the said proceedings had, in any district court of the United States in which said ship or vessel may be libeled; \* \* \* or, if the said ship or vessel be not libeled, then in the district court for any district in which said owner or owners may be sued in that behalf." Both clauses of the rule above cited are in the present tense. There is a libel pending, and the vessel is libeled; but not in any district court. The appeal removed the cause completely into the circuit court.

In the case of *The Benefactor*, 103 U. S. 239, proceedings to limit liability, after an appeal to the circuit court had been had, on the libel for damages, were taken in the district court for the Eastern district, where the libel for damages had been filed. The supreme court, in reversing the decree of the circuit court in the limited lia-

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

bility proceedings, directed that all the further proceedings therein be had in the circuit court; and at the same time provided by the new rule (58) that, where "such cases are or shall be pending in said courts on appeal from the district courts," "the rules and regulations shall apply to the circuit court."

This rule was adopted on the ground of convenience. It is based solely upon the pendency of the cause in the circuit court, and because the final decree, after appeal to the supreme court, is ordinarily a decree of the circuit court upon the mandate of the supreme court. The question considered by the supreme court in the case of *The Benefactor* was, where shall the limited liability proceeding be continued upon a reversal by the supreme court of a decree of the circuit in that proceeding? The court directed in that case, and provided generally by rule 58, that in "such cases" the further proceedings might be had in the circuit court. I do not think that the decision, or rule 58, was intended to determine the place where the *original* proceeding to limit liability should be commenced, even though a libel for damages might be then pending in the circuit, or in the supreme court.

In all admiralty causes, the district court is the court of original jurisdiction, and the circuit court is an appellate court only. The proceedings in limitation of liability ought undoubtedly to be conducted, so far as possible, upon the analogy of all other proceedings in admiralty, and therefore commenced in the district court, so that the right of appeal and review in the circuit may remain unimpaired. The words "such cases," near the close of rule 58, should therefore be construed as referring only to the cases of direct proceedings to limit liability, and not to cases in which only a libel for damages may be pending in the circuit on appeal.

The question comes back, therefore, to the construction of rule 57. Under that rule, as the vessel has been libeled for damages, the second clause does not apply; and consequently the words "may be libeled," in the previous clause, must be construed as including cases in which the vessels may *have been libeled*. The present proceedings should therefore have been instituted in the district court of the Eastern district. This conclusion harmonizes with the precedent of *The Benefactor*, *ubi supra*, which should be followed in this case.

The motion to dismiss the proceeding will therefore be granted.

THE MARY FRASER.<sup>1</sup>

MARCUSSEN and others v. THE MARY FRASER.

LAURO v. SAME.

(District Court, S. D. New York. March 17, 1886.)

## 1. COLLISION—ANCHORING—FOUL BERTH.

The bark S. having come to anchor at least 800 feet distant from another vessel, the ship F., which lay at anchor about half a mile from the Staten island shore, in New York harbor, *held*, that the position of the S. was not so dangerously near the F. as to render her liable to the charge of negligence for anchoring in a "foul berth."

## 2. SAME—TWO VESSELS—DRAGGING ANCHOR—NEGLIGENCE.

The bark S. having thus anchored near the ship F., the vessels swung at ease and without interference during four changes of the tide, both vessels being held by their port anchors only. Afterwards the ship F. dragged anchor, and drifted towards the bark S. until their cables fouled, when both began to drift. The F. dropped her starboard anchor, but the F. at no time dropped her starboard anchor. With the turn of the tide the ship drew across the bows of the bark S., and all efforts to separate them by the use of sails and lines being of no avail, and no tug being procurable, as the tide became stronger both vessels were carried down the stream until they collided with another vessel, the M., and again with another, the N., which latter, together with the bark S., was injured. *Held*, that it was negligence on the part of the ship F. that her starboard anchor was not let go as soon as she was perceived to be drifting, as well as afterwards, while the vessels were still apart. As the evidence showed no fault on the part of the bark S., *held*, that the latter was not bound to slip her port anchor for the F.'s benefit, nor to run the risk of paying out suddenly all her spare chain, but that the damage occasioned should be borne by the ship.

In Admiralty.

*James K. Hill, Wing & Shoudy*, for libelants.*Sidney Chubb*, for claimants.

BROWN, J. The above libels arise out of damages caused by the drifting of vessels at anchor. On the seventh of August, 1885, the Norwegian bark Svalen was towed down the harbor upon the flood-tide, preparatory to going to sea, and came to anchor about half a mile off the Staten island shore at a distance variously estimated from 600 to 1,800 feet north-westerly from the British ship Mary Fraser which had been previously anchored there upon her arrival from sea.

One of the defenses of the claimants is that the Svalen anchored in a foul berth; that is, dangerously near the Mary Fraser. The two remained in the same relative position, however, for about 24 hours, during which time there were four turns of the tide, and they swung at ease without any interference with each other. The weight of evidence would show that they were at least 800 feet apart; and I find that, under the circumstances of their situation, that was sufficient

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.



room, and not a foul berth for the Svalen, and that no charge of negligence in that respect is proved against her. *The Sapphire*, 11 Wall 170; *The Princeton*, 3 Prob. Div. 90; *The Julia M. Hallock*, 1 Spr. 539.

About 4 o'clock on the afternoon of the eighth of August, the tide being flood, the Mary Fraser was seen slowly drifting up towards the Svalen, dragging her anchor. This was observed upon both vessels at about the same time. Both were anchored by their port anchors only. Had the Fraser then dropped her starboard anchor at once, as she might have done, I have no question that all the subsequent difficulties would have been avoided. She did not do so, but continued to drift upwards until her chain fouled the Svalen's cable, which then held both in place. Soon afterwards the ship commenced to haul in her cable, which caused both vessels to drift, and made it clear that their chains were afoul. The hauling in was stopped; the Svalen let go her starboard anchor; and both were thus held in place for a couple of hours or more afterwards. The vessels were prevented from fouling by putting their helms in contrary directions, and the tide, under such helms, was sufficient to keep them from 20 to 50 feet apart, the ship's stern overlapping the Svalen's bows. They lay in this position for two or three hours, during which time efforts were made to obtain a tug; but, the day being that of Gen. Grant's funeral, no tug could be obtained. With the turn of the tide the ship drew gently under the bows of the Svalen, and both swinging round in this position, various efforts were made, by sails and lines, to separate them; but without avail. As the ebb-tide became strong, the ship, lying somewhat across the bark's bow, was under so great a pressure from the current that she could not be extricated; and presently both were carried down the stream together. The Marshall, lying at anchor below, was first struck, but without doing much injury to either; but, on striking a fourth vessel, the Navigatore, the shock was sufficient to clear the chains previously afoul, and thereby let the ship go free; but the collision damaged the Svalen and the Navigatore. The above libels were filed to recover these damages.

Without specifying further the numerous details of this case, it seems clear to me that if the officers of the ship, when she was first observed to be drifting, had let go their starboard anchor, no subsequent damage would have been done. This was the appropriate and the proper remedy, and was fully within their power. Any other reliance was plainly at the risk of the vessel, and of doubtful result. I must hold it, therefore, negligence on the part of the Mary Fraser that her starboard anchor was not let go as soon as she was seen to be drifting. During the two hours, also, after the two chains had fouled, the same remedy was possible. When they were 25 or 50 feet apart the Fraser's starboard anchor could have been dropped, her port cable slipped and buoyed, or connected with the Svalen for safety, and the Fraser thereby have been dropped safely astern. Her omis-

sion of either of these precautions was at her own risk, and makes her answerable for the subsequent damages. *The Eloina*, 10 Ben. 458, 459; *The Northampton*, 1 Spink, Adm. 152.

2. No fault is proved on the part of the *Svalen*. When both were drifting together, it was plainly the duty of the *Svalen*, having reference to the vessels astern, to drop her starboard anchor as she did. Afterwards, when the ship got across her bows, and was trying to get clear by her sails, it was urged that the *Svalen* should have let go all her spare chain in order to ease the pressure. The evidence seems to show that she had still some chain not paid out; but the tide was acting very much more strongly upon the ship, which lay across the bark, than on the *Svalen* herself. The suggestion that easing up on her cable would have enabled the ship to get clear is mere speculation and hypothesis, and, in my judgment, improbable; and hence not a sufficient ground for holding her in fault. There is no probability that it would have done any good; certainly not, without letting it all go suddenly, and that would be a dangerous expedient, and an experiment only, which the *Svalen* was under no obligation to adopt for the *Fraser's* benefit, not being herself in fault.

The other points urged against the *Svalen* seem to me without weight.

The day was calm and fine. The officers of the *Fraser* probably thought they could avoid any damage without the trouble of letting go the starboard anchor, and would get clear by tripping the port anchor and going astern. Afterwards they were no doubt reluctant to slip their port cable, preferring to rely upon their chances of getting clear by means of their sails; but the wind was so light, and the pressure of the tide so strong, that this was impossible. The *Svalen* was not bound to slip her own cables, not being in fault. It was at the ship's risk that she delayed in taking efficient measures to check her drifting by dropping her starboard anchor in time. The damages must, therefore, be charged upon her.

Decree for the libelants, with costs.

---

### CANADA SHIPPING Co. v. ACER and others.<sup>1</sup>

(District Court, S. D. New York. February 22, 1886.)

#### CHARTER-PARTY — MEMORANDUM — CONSTRUCTION — SPECIFIED VOYAGES — "INTENDED TO LOAD."

Respondents contracted by charter to ship, during the season, a specified number of cattle by each of the steamers of the Beaver Line. Accompanying the contract was a memorandum of the intended sailings, stating the vessels, the expected date of each voyage, and the number of cattle to be shipped on each, in which memorandum these words also appeared: "This contract to

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

include all steamers of the Beaver Line intended to load at New York this season." The respondent shipped the full number of cattle upon each of the voyages specified in the memorandum. Shortly before the end of the season, without the consent of respondents, another voyage was added by the agents of the line, who notified respondents that they would be expected to load this vessel also under the contract, which respondents refused to do. On suit brought against them for breach of contract, *held*, that the words "all steamers intended to load" meant "intended at the time when the contract was made;" that the extra voyage was not then contemplated; and that the contract could not subsequently be enlarged beyond the scope of the memorandum, without the consent of respondents.

In Admiralty.

*Ullo, Ruebsamen & Hubbe*, for libelants.

*Wm. B. H. Dowse*, for respondents.

Brown, J. The libelants are the owners of the line of steam-ships known as the "Beaver Line," running in summer between Montreal and Liverpool, and during the winter months between Liverpool and New York. On the tenth of February, 1883, Seager Bros., agents of the line in New York, made a contract with the respondents, composing the firm of C. M. Acer & Co., by means of a letter and an answer, the material parts of which are as follows: The libelants offered "to freight from the port of New York to the port of Liverpool, by steamers of Beaver Line intended to be dispatched about as per memorandum attached, [blank] head of cattle, at the rate of £4 sterling per head." Attached to this offer was the following memorandum:

"MEMO. OF INTENDED SAILINGS OF BEAVER LINE. Cattle.

Lake Winnipeg, about third March,	-	-	-	-	239 head.
Lake Manitoba, about thirteenth March,	-	-	-	-	239 "
Lake Champlain, about twenty-first March,	-	-	-	-	136 "
Lake Huron, about third April,	-	-	-	-	136 "
Lake Nepigon, about fourteenth April,	-	-	-	-	136 "
Lake Winnipeg, about twenty-fourth April,	-	-	-	-	239 "

"This contract to include all steamers of Beaver Line intended to load at New York this season.

[Sd.]

"SEAGER BROS., Agents.

"We accept the above offer, and hereby agree and bind ourselves to ship the specified number of animals, on the terms and conditions there stated.

[Sd.]

"C. M. ACER & Co."

When this contract was made, the respondents, referring to the memorandum of the steamers and number of animals, inquired of Seager Bros., "Is that all?" to which the answer was given, "It is." The respondents thereafter furnished the cattle for all of the steamers named in the above memorandum to the full number specified, and paid for them according to the contract. After four or five of said steamers had been loaded and dispatched, and some time prior to the sixteenth of April, 1883, another voyage of the steam-ship *Manitoba* was added by Seager Bros. to the above list, without the assent of the respondents, and the latter were notified by Seager Bros. that the

Manitoba would sail on the twenty-third of April, and that the respondents would be expected to load her under the contract. This would be on the day previous to the last specified voyage of the Winnipeg. The respondents immediately notified Seager Bros. that they should not load the Manitoba for the twenty-third of April, claiming that it was not within the contract, and they did not load her. This libel was filed to recover damages for this refusal.

The case turns upon the construction of the written contract, and the right of the libelants to add another voyage to the trips specified in the memorandum. The memorandum, being referred to in the contract, is as much a part of it as though it were inserted in the body of the contract itself. The libelants rest upon the final clause of the memorandum: "This contract to include all steamers of Beaver Line intended to load at New York this season." They claim that the effect of this is to bind the respondents to load all such steamers as the libelants might choose to dispatch to Liverpool during the season. If that is the effect of the contract, the respondents are liable. But, upon the other facts above stated, I am of the opinion that this is not the legal meaning or effect of the contract. Even the literal meaning of the clause just quoted fails to sustain the libelants' contention. At most, it includes only the steamers of the Beaver Line intended to load at New York. The word "intended" must mean "intended at the time the contract was delivered." It cannot reasonably be supposed that the intention of the parties was that the contract could be materially enlarged or restricted by the indefinite future changes of intention by one party, without the other's assent, at any time up to the close of the season. The list furnished is expressed to be a "memorandum of intended sailings;" and it specifies the vessels, the dates, and the head of cattle required on each voyage; and that memorandum, with the statement that "this is all," fixes positively just what was intended at that time. It was incompetent, therefore, for the libelants to insert, some two months afterwards, an additional voyage, and thus enlarge the obligations of the contract without the respondents' assent. That voyage was clearly not among those intended when the contract was signed.

Again, the agreement signed by the respondents is expressly to ship a "specified number of animals." The number of animals was exactly specified in the memorandum attached to the contract, and the respondents have exactly fulfilled it. To add another vessel to the list is a material enlargement of the specific number, and, as it seems to me, altogether beyond the intent of the writing to give the contract definiteness and precision.

Had the clause relied on by the libelants been actually designed to give them the right to add to the list of voyages, and to increase the number of cattle required to be furnished, the language of the clause would naturally have been quite different from what it is, and would have stated more clearly such an intention. The clause as it stands,

coupled with the verbal statement and the list of voyages, is in effect a representation that the contract as made, and the list attached, do include "all the *steamers* intended to load" during the season. The statement was correct. The *Manitoba* was one of the steamers intended to be loaded. She had made one voyage on March 13th, for which the respondents had furnished the stipulated head of cattle. The clause referred to, so far as respects the *Manitoba*, was fulfilled literally. The libelants undertook to make with that steamer an additional voyage not included in the list, and thereby to extend the number of animals to be shipped beyond that specified, although the steamer had already made the voyage specified, and had been supplied with the number of animals agreed on. This, in my judgment, was outside of the contract, as well as contrary to the intention of the parties; and the libel must therefore be dismissed, with costs.

---

### THE ABERCORN.

(*District Court, D. Oregon. March 25, 1886.*)

#### PILOTAGE ON COLUMBIA RIVER—RIGHT OF MASTER TO CHOOSE PILOT.

The Columbia river is the boundary between two states, (Oregon and Washington,) within the purpose and spirit of section 4236 of the Revised Statutes, and therefore the state of Oregon cannot require a vessel bound in or out of said river to take an Oregon pilot, or pay him half or any pilotage, if the master thereof prefers to and does take a Washington pilot.

In Admiralty.

*Raleigh Stott*, for libelant.

*Henry Ach*, for respondent.

DEADY, J. This suit was commenced on December 26, 1885, to recover the sum of \$176 for half pilotage. It was heard on February 15th, on an exception to the answer, and the decision has since been delayed to suit the convenience of counsel. It is alleged in the libel that the libelant, J. E. Campbell, is, and since prior to October 19, 1885, has been, a duly-licensed pilot, under the law of Oregon and the United States, for the Columbia river bar, attached to the pilot-boat Governor Moody; and that on or about said October 19th he piloted the British bark *Abercorn* from the sea over the bar to Astoria; that afterwards, and before the commencement of this suit, said vessel was lying at Astoria, drawing 20 feet of water, and bound out to sea, when the libelant offered his services to the master to pilot her over the bar, which offer was refused, and said vessel is going to sea with a pilot other than one belonging to said boat, wherefore the libelant is entitled to recover the value of the services so tendered and refused, namely, the sum of \$176. The answer of James Laidlaw, the agent

of the owners, substantially admits the allegation of the libel, and as a defense thereto alleges that at and before the tender of pilot service by the libelant the master of the Abercorn had employed Alexander Malcolm, who was a duly-licensed pilot under the law of Washington and the United States, to pilot said vessel to sea; and that said Alexander Malcolm did thereafter so pilot the same, for which he was duly paid by said master. The libelant excepts to this defense as irrelevant.

By the Oregon pilot act of October 20, 1882, the pilot commissioners for the Columbia river and bar may license as many bar pilots as they may deem necessary; and such pilots must keep a seaworthy boat, of a certain tonnage, on the pilot ground. Sess. Laws, 19. Section 33 of the act provides that "a pilot who brings a vessel in over the Columbia river bar is entitled to pilot her to the sea, when next she leaves the river;" but the commissioners may allow the master to take another pilot from the same boat. The object of this section was to reward a pilot for cruising off shore for vessels bound into the river, by giving him the exclusive right to the comparatively easy and lucrative service of taking a vessel out that he had been to the trouble of finding and bringing in. And by section 30 of the act (Sess. Laws, 20) it is provided that if such pilot's offer of service is declined by the master, he shall pay him half pilotage. A claim for pilotage on such grounds may be enforced in the admiralty, either against the master or the vessel. *The Glencarne*, 7 Sawy. 202; S. C. 7 Fed. Rep. 604.

By section 21 of the act of February 18, 1885, (Sess. Laws, 35,) the pilot commissioners were required to build a pilot-boat at the expense of the state for the use of the bar pilots licensed by them, which it is well understood has been done, and that the vessel mentioned in the libel as the Governor Moody, to which the libelant is attached, is the boat. The object of this legislation, so far as appears, was to deprive the tug-boats at the mouth of the river of the privilege of carrying bar pilots, or being in any way engaged in the pilot service. The result is so well known that it may be mentioned here as a fact. The pilots connected with the tugs have taken out licenses as bar pilots under the law of Washington, and are piloting vessels over the bar in connection with the towage service. Hence this controversy. The pilot Malcolm is a Washington pilot, and doubtless cruises on one of the tugs, and when he piloted the Abercorn to sea he did so as what may be called a tug-pilot in contradistinction to a schooner pilot. Congress having the power to regulate commerce, may regulate pilotage as a matter pertaining thereto, on the navigable waters of the United States; but until congress exercises such power the state may make such regulations. *The Glencarne*, 7 Sawy. 202; S. C. 7 Fed. Rep. 604.

By the act of March 2, 1837, (5 St. 153; section 4236, Rev. St.,) congress provided that "the master of any vessel coming into or going

out of any port situate upon waters which are the boundary between two states, may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot the vessel to or from such port." It is well known that this act grew out of the "pilot war" between New York and New Jersey, in which each state undertook to secure its pilots some exclusive privilege or advantage on the pilot ground in and about the mouth of the Hudson. In the case of *The Panama*, Deady, 31, this court held that the Territory of Washington is a "state," within the purpose and spirit of this legislation; and this ruling was followed in *The Ullock*, 9 Sawy. 641; S. C. 19 Fed. Rep. 207.

Assuming, then, that this section 4236 of the Revised Statutes is applicable to pilotage on the Columbia river, the boundary between Oregon and Washington, this suit cannot be maintained. As between the Oregon pilots, doubtless, the regulation compelling the master of a vessel to take the pilot out of the river that brought him in is valid and binding; but the state cannot compel a vessel in the Columbia river to take an Oregon pilot under any circumstances, or to pay him half or any pilotage, if the master prefers to and does take a Washington pilot. The matter is too plain for argument, and only needs to be stated to be understood. The act of congress is paramount, and no regulation of the state can impair or limit its operation. As applied to the facts and circumstances of this case, it declares, in effect, that the master of any vessel, whether bound in or out of the Columbia river, may take a pilot from either Oregon or Washington, without any reference to the fact of which offered his services first, or whether either of them had served as pilot on the vessel before.

The libel is dismissed, and the respondent is entitled to a decree for costs and disbursements.

---

### THE PLYMOUTH.<sup>1</sup>

#### NEAL v. THE PLYMOUTH.

(Circuit Court, D. Maine. February 18, 1886.)

#### COLLISION—SCHOONER—TUG AND TOW.

The libellant, while sailing a small boat, was run into by a schooner; the latter vessel being at the time in charge of a tug. *Held*, that, as the evidence showed that the tug and tow would have passed the libellant's boat in safety had he not changed his course, the libel must be dismissed.

In Admiralty.

H. D. Hadlock, for appellant.

Woodman & Thompson, for appellee.

<sup>1</sup>Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

COLT, J. In the early part of the afternoon of October 23, 1884, the libelant, while sailing in a small boat up Casco bay, and standing in towards Falmouth Foreside, was run into by the schooner Julia A. Decker, then in tow and under the control of the steam-tug Plymouth, and bound from Portland to Yarmouth, Maine. The weight of evidence shows that there was but little wind, and that it came in puffs from the south-west. The libelant testifies that he did not see either the tug-boat or schooner until his boat was struck and capsized. The captain of the tug-boat testifies that he was standing near the pilot house, and observed the little sail boat some distance off on the starboard bow; that, as he drew up within two or three hundred yards of her, seeing nobody in her, he ordered Mayberry, the man at the wheel, to blow the whistle, when, no one answering, the whistle was blown a second time. He then hailed the boat, and a man sprung up out from the bottom of the boat, and began at once to paddle towards the vessels until his mast struck the bobstay of the schooner. The captain halloed to him to stop. When the man rose up and paddled, the captain directed Mayberry to starboard the wheel, which was done. When it was found that he would paddle into the tug or schooner, the captain says he directed the tug to stop and back. Capt. Dean's testimony, while it differs in some particulars, such as the distance of the small boat from the tug when the first whistle was sounded, is, upon the whole, confirmed by Mayberry, the man at the wheel, and by Capt. Freeman of the schooner.

The question of negligence in this case turns upon a single point, did the libelant, without warning and suddenly, as the tug was approaching, paddle towards it? This fact is established by the testimony of all the witnesses for the libelees, and is not, I understand, denied by the libelant. The steam-tug was required to keep out of the way of the sailing vessel, provided the latter kept her course. But it was imperative upon the sailing vessel to keep her course, and if she deviates therefrom, and a collision happens, the steamer is not liable therefor. *The Illinois*, 103 U. S. 298; *The R. B. Forbes*, 1 Spr. 328; *The Fannie*, 11 Wall. 238; *The Carroll*, 8 Wall. 302; *The Free State*, 91 U. S. 200. In the present case the steam-tug had a right to assume that the sailing vessel would keep on her course, and for the libelant to take an oar and paddle towards the tug was an act of negligence which relieves the tug from any liability for the collision. Nor can the libelant, upon the facts presented in this case, excuse his act on the ground that the error was committed when the peril was impending and the collision inevitable. The evidence goes to prove that the steam-tug and tow would have passed him in safety had he not rowed towards them.

The decree of the district court dismissing the libel is affirmed.



PHELPS v. ELLIOTT.

(*Circuit Court, S. D. New York. March 31, 1886.*)

1. REMOVAL OF CAUSE—PRACTICE—CASE AT LAW AND EQUITY, HOW TREATED.

In the courts of the United States the distinction between suits at law and in equity is maintained, and when a suit involving both is removed, then the pleadings must be recast, and the causes of action stated according to the course of procedure on the law and equity sides of the court, respectively, and the causes separated and placed there.

2. EQUITY PRACTICE—STATE PRACTICE—MAKING COMPLAINT MORE DEFINITE.

The practice under a state code to require a plaintiff to make his complaint more definite and certain does not apply to the equity side of the circuit court, for the state practice is not adopted in equity.

3. SAME—AMENDING BILL.

In a suit in equity defendant has no right to have the plaintiff amend his bill, nor is it required of him to do so to expose defects, or supposed defects, in his case, on motion of defendant.

4. SAME—COMPELLING PRODUCTION OF RECORD PLEADED IN BILL.

Where a record in bar to relief is pleaded, the defendant may be required to show it before the plaintiff traverses the plea, or sets it down for argument, but this practice does not extend to the pleading of a judgment or decree of another court in the bill of complaint.

In Equity.

*Joseph Larocque and R. D. Harris*, for defendant.

*L. L. Kellogg and H. B. Titus*, for plaintiff.

WHEELER, J. This suit was commenced in the superior court of the city and state, of New York, according to the Code of Procedure of the state, by which the distinctions between legal and equitable remedies is understood to be abolished, and was removed into this court on account of the citizenship of the parties. The complaint, according to the supposed requirements of that Code, sets out the whole of the plaintiff's case. The defendant has answered the complaint, and the plaintiff has filed a replication.

The complaint alleges, in substance, that the plaintiff is assignee in bankruptcy of one Augustine R. McDonald, who had a claim against the United States, which was fraudulently procured to be transferred through one White to him, and on which he obtained an award of \$197,190 in gold, which he assigned to White; that the plaintiff brought suit in the supreme court of the District of Columbia against McDonald and White to obtain the amount of the award, in which one Riggs, a partner of the defendant in banking business, was made receiver of \$107,012.87, avails of the award, which, under order of the court, he invested in bonds of the District of Columbia; that the suit was decided in favor of the defendants by that court, but the decision was reversed on appeal by the supreme court of the United States, and the right of the plaintiff to the avails of the award established, (*Phelps v. McDonald*, 99 U. S. 298;) that during the pendency of the suit McDonald fraudulently procured the bonds of

the receiver, and sold and delivered them to the firm of which the defendant and the receiver were members, and who had full knowledge of the plaintiff's right to the bonds. The prayer of the complaint is that the defendant may be declared to have acquired no title to the bonds but in trust for the plaintiff as assignee in bankruptcy of McDonald; and that he account to the plaintiff for the bonds, and be decreed to deliver them to the plaintiff, and for further relief.

The principal defense set up in the answer, which has been amended, is that the decree of the supreme court of the District of Columbia in the suit was that the bill of complaint of the plaintiff therein be dismissed, with costs, and the receiver pay and deliver the funds by him held as receiver to the defendants therein, McDonald and White; that this was done; that "said decree, as to the matters therein ordered, adjudged, and decreed between said receiver and said plaintiff did at all times remain and still remains unreversed, and in full force and effect;" that the receiver filed his account, whereby it appeared that he had delivered the bonds to the defendants after the decree, and that no exceptions have been taken or filed to the account; that \$300 of the bonds were payable to bearer, and \$152,000 to Riggs, receiver, which were indorsed by him as such in blank before delivery, and that they were bought by the firm as negotiable paper, in the usual course of business, in good faith, without notice of any claim in favor of the plaintiff. The defendant now moves that the plaintiff be required to annex copies of the decree of the supreme court of the United States, and of the record of the suit in the supreme court of the District of Columbia, including the final decree, to his complaint, or that it be referred to a master to ascertain the existence of such records, and report them to be annexed to the complaint, and that thereupon the defendant have leave to withdraw his answer and demur; or that the plaintiff be required to replead, and if advised that his cause of action is or should be on the equity side of the court, to state it distinctly in a bill in equity, and if on the law side, to state it distinctly there. The cause has now been heard on this motion.

Under the Code of Procedure of the state two or more causes of action, whether legal or equitable, or for the recovery of chattels, may, it appears, be united in the same complaint. Sections 484, 1689. In the courts of the United States the distinction between suits at law and in equity is maintained, and when a suit involving both is removed there the pleadings must be recast, and the causes of action stated according to the course of procedure on the law and equity sides of the court, respectively, and the causes separated and placed there. *La Mothe Co. v. National Co.*, 15 Blatchf. 432.

It is argued for the defendant, in support of the motion, that this suit embraces a cause of action at law for the recovery of chattels, and also grounds for equitable relief, and that it must be reformed before it can be proceeded with; and that part of the prayer for re-

lief which asks the delivery of the bonds is much relied upon in support of the claim that a cause of action at law is stated. It is not understood, however, that a prayer for such relief as a court of law can give at the end of the statement of a cause of action makes it an action at law, but that the grounds of action should be such as a court of law can proceed upon to judgment. There might be a suit in equity which could result in a decree for the payment of money only, of which a court of law could, without statutory help, take no cognizance to give relief; as, a bill for an account between more than two partners. It is not understood that a court of law, under this Code, can render a judgment for the recovery of chattels as such, except upon a legal title and right of possession. The plaintiff's title and right to these bonds, as stated in the complaint, appear to be purely equitable. Neither the bankrupt before bankruptcy nor he since has ever owned them. The original claim passed to him as assignee. He did not collect it, nor any one for him. He had no right to the avails except to charge whoever had them as a trustee of them for him. In the hands of the receiver they were trust property for whoever should appear eventually to be entitled to them. The bonds were impressed with the same trust. A court of equity could lay hold of the bonds and decree them to the equitable owner. It is a peculiar province of equitable jurisdiction to enforce such trusts. *Abell v. Howe*, 43 Vt. 403. The complaint appears to state one cause of action only, and that an equitable and not a legal one. The case does not, therefore, fall within the decision in *La Mothe v. National Co.*, 15 Blatchf. 432, nor that in *Hurt v. Hollingsworth*, 100 U. S. 100. The complaint is substantially in the form of a bill in equity, except the address and some other merely formal parts. There is therefore no apparent ground for requiring it to be recast, even if a defendant would ever have a right to require a plaintiff in equity to restate his case. The practice, under the Code, to require a plaintiff to make his complaint more definite and certain does not apply to the equity side of this court, for the state practice is not adopted in equity.

It remains to be seen whether, treating this as a suit in equity, the defendant has a right to have the plaintiff amend his bill, or it is proper under the circumstances to require him to amend his bill, to expose defects, or supposed defects, in his case, on motion of the defendant. No case where such a requirement has been made, or book of practice where such a course has been laid down, has been cited or observed. Where a record in bar to relief is pleaded, the defendant may be required to show it before the plaintiff traverses the plea or sets it down for argument. In that case the whole plea depends upon the record, and what the record is can be definitely and readily shown. *Emma Silver Min. Co. v. Emma Silver Min. Co. of N. Y.*, 17 Blatchf. 389; S. C. 1 Fed. Rep. 39. The practice does not appear to have extended elsewhere than to such pleas. At common law a defendant might crave oyer of an obligation declared on

with profert, and set it out, and demur, and the instrument would be treated as a part of the declaration; but there was no oyer of a record accessible to all, (1 Chit. Pl. 415,) and in all such cases the instrument is declared upon as the foundation of the action. Here the record is not understood to be so. The ground of the action, as it is understood, is that the defendant has the avails of the claim for cotton in his hands which in equity belong to the plaintiff. The proceedings are stated with other matters of knowledge, collusion, and fraud, apparently to show how the avails became converted into bonds, and how the bonds came to the defendant's hands; and the reversal of the decree of the supreme court of the District of Columbia to show that the bonds were not finally decreed away from the plaintiff. The complaint shows that the supreme court of the United States declared what the plaintiff's rights to the award were in reversing the decree, but not that the avails of the award, in money collected or as the same was invested in bonds, were ever decreed to the plaintiff. What became of the case after the reversal of the decree is not set forth by either party. The traverse of the answer puts in issue the allegations that the decree, as to matters between the plaintiff and the receiver, remains unreversed, and as to the filing of the receiver's accounts. These are matters relied upon by the defendant as an absolute bar to the right of the plaintiff to relief, so that this part of the defendant's case rests more directly upon the record of the proceedings in the former case than any part of the plaintiff's case. Under these circumstances, it would appear to be more in accordance with the practice to require the defendant than the plaintiff to produce the records, and make them a part of the case. Motion denied.

---

PRESTON *v.* SMITH.<sup>1</sup>

(*Circuit Court, E. D. Missouri.* March 26, 1886.)

1. PLEADING—WHAT A DEMURRER ADMITS.

A demurrer to a bill admits the truth of facts well pleaded, but not of averments amounting to statements of law.

2. SAME.

Where a bill to quiet title shows the source and nature of the complainant's title, and contains an allegation that his title is clear and undisputed, a demurrer to the bill will be taken to admit only such title as the facts stated disclose.

3. REAL PROPERTY—ESTATES TAIL.

Section 3941, Rev. St. Mo., abolishes estates tail in Missouri.

4. EQUITY—INJUNCTION TO RESTRAIN WASTE.

A court of equity will not issue an injunction to restrain waste, unless the complainant's title is clear, or has been adjudicated on.

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.

**5. SAME—BILL TO REMOVE CLOUD UPON A TITLE.**

A bill to remove a cloud upon a title will not be sustained, as a general rule, where the alleged cloud is created simply by matter of record.

**6. SAME.**

The mere fact that a life-tenant is granting leases for terms extending beyond the duration of the life-estate is no basis for any action by the remainder-man.

**7. SAME—SLANDER OF TITLE.**

For mere slander of title, a party injured will be left to his legal remedy.

**8. SAME—LIFE-TENANT AND REMAINDER-MAN.**

An action cannot be maintained in equity by a remainder-man against a life-tenant for the purpose of adjudicating the title of the former. The remedy is by action at law, and should be against the other claimants of the remainder.

**9. SAME—BILL FOR DISCOVERY.**

A bill for both relief and discovery cannot be sustained solely for the sake of discovery.

**10. SAME.**

*Seemle*, that a bill cannot, as a general rule, be sustained solely for the sake of discovery.

In Equity. Demurrer to bill. For opinion on demurrer to original bill see 23 Fed. Rep. 737.

*Henry Hitchcock*, for complainant.

*John Wickham and Given Campbell*, for defendant.

BREWER, J. On the fourth day of March, 1885, complainant filed his bill in this court for an injunction against the defendant. To that bill a demurrer was filed, and after argument sustained. Thereafter, on July 30, 1885, an amended bill was filed. To that a demurrer has been interposed, and is now submitted for decision. The bill charges that the defendant holds the life-estate simply in certain premises described, while the complainant owns the remainder in fee. The bill further avers that the defendant is a privy in estate with complainant, and as such privy in estate ought not to do any act or say anything to deny the complainant's title to said land, or to cloud or impeach his title; but that said defendant has so acted, and is so acting, as to cloud complainant's title, in divers ways: (1) By stating and declaring to sundry persons, including her tenants in possession of said lands, that complainant has no interest therein, and that the fee in remainder thereof has already vested in other persons, heirs at law of William Christy, including the defendant. (2) By granting leases and creating terms in said land purporting to extend beyond the period of her own natural life, and beyond the rightful duration of her life-estate; and that she is in possession of said lands by and through divers tenants holding the same under her. (3) By wasting said property, and granting leases at back rent, cutting down trees, etc. (4) By confederating with divers persons beyond the jurisdiction of this court, claiming to be William Christy's heirs at law, to becloud the title of complainant as stated. (5) And that by such declarations and acts she is tortiously clouding the title of complainant, and greatly injuring him in the enjoyment of his rights as remainder-man in fee; and that in consequence of said declarations and

acts of defendant here complained of, complainant has been, in fact, prevented from raising money by mortgage on his interest as remainder-man.

In the original bill the allegations as to the respective titles of complainant and defendant were comparatively brief and in general terms. In the amended bill the nature and extent of the titles are more fully described, and it is insisted that the complainant's title has been adjudicated; that it is a clear, legal title; and that practically it is admitted to be such by the demurrer. All of these matters are challenged by the defendant's counsel.

The first inquiry, therefore, naturally is, has the complainant's title been adjudicated? A brief preliminary reference to the nature and source of title is important. Both claim under the will of William Christy, who died in 1837, leaving a widow and several children. By that will he gave a life-estate in these premises to his widow. He further disposed of the premises in these words:

"I also give and bequeath to my daughter, Virginia M. Christy, the two blocks of lots," etc., "herein willed to her mother during her life, to her, the said V. M. Christy, and the heirs of her body, forever; but should she die without leaving heirs of the body, the property hereby willed to her [and her] mother during their lives shall then be and become the property of Edmund T. Christy and Howard F. Christy, to them and their heirs of their bodies, or either of them. In case that but one of my said sons shall leave a legal heir or legal heirs of his body, that one shall inherit the aforesaid property."

The defendant is Virginia M. Christy, the party named in this devise. The bill avers that the defendant is without heirs of her body; is now more than 60 years of age, and without any possibility of leaving such heirs. It also appears that Edmund T. Christy died in the year 1851, without heirs of his body; that in 1853 Howard F. Christy also died without heirs of his body, but having devised all his interest in this land to his wife, Susan Preston Christy, from whom complainant obtained title.

Now, it is insisted that in the case of *Smith v. Sweringen*, 26 Mo. 551, the complainant's title was adjudicated. I have examined the opinion in that case, and see nothing which either directly or by implication can be considered an adjudication of complainant's title. The facts in that case are these: As above stated, William Christy died in 1837, leaving a widow and several children. Also some grandchildren, children of two deceased daughters. By his will he made certain specific devises. To three of his grandchildren, children of a deceased daughter, he devised such portion of his landed estate as would have been their mother's, had she survived him, and he had died intestate. He made also a similar devise to the daughter of his other deceased daughter. Three of his daughters were not named in the will, and as to them he died intestate. After his death, and in 1843, during the life-time of his widow, a partial partition was made among the heirs. After the death of the widow, and in 1855, the defendant in this suit and her husband commenced an ac-

tion of partition in the St. Louis land court. It was specifically an action for the partition of 14 lots. The court held, first, that the intestacy named in the will was a partial and not a total intestacy, and the partition, therefore, between the heirs was to be of the property not specifically disposed of. It does not appear that any suggestion was made or considered as to where the remainder in fee of these specific blocks was vested. The action was for the partition of 14 lots. It does not appear that partition was asked of any other lots. The defendants, it is true, claimed compensation on account of an alleged total intestacy, and the court simply denied that claim. It does not appear that any inquiry was made as to whether there was other property to be partitioned, but the decision went simply as to the rights in these 14 lots. The other questions decided as to the effect of this partition suit upon certain suits on bonds given, and as to compensation for a mistake in the prior partition, are equally foreign to the question of title to the specific blocks now in controversy.

It is clear to my mind that there was neither directly, nor by implication, any adjudication for or against complainant's title in that case, nor do I think it can be said that complainant's is a clear legal title. Indeed, I think it a very doubtful question as to where the remainder in fee is vested. Complainant has filed a most elaborate and learned brief upon the old common-law doctrine of estates in tail, with an inquiry into the effect of the Missouri statutes thereon. He invokes the doctrine of cross-remainders in tail, and insists that there was a vested remainder in fee in Howard F. Christy, the survivor of the two brothers named in the devise, and that though both these brothers died without heirs of the body, yet that, as Howard P. Christy had a vested remainder, it was an estate descendible, and therefore devisable. On the other hand, it is claimed by the defendants that it was but a contingent remainder,—contingent on the death of defendant without issue; that at the time of the death of Howard F. Christy without heirs, Virginia M. Smith, the defendant, the devisee of the life estate, was living, with possibility of issue; and being but a contingent remainder, it was not descendible nor devisable, and that the estate, on the death of the present defendant, the holder of the life-estate, will vest in the heirs of William Christy.

The statutes of Missouri (section 3941, 1 Rev. St.) abolish estates in tail, and declare that the person to whom the devise or grant is made, instead of being seized of the property in fee tail, "shall be deemed to be seized thereof for his natural life only, and that the remainder shall pass in fee-simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee, etc., in tail first pass, according to the course of the common law;" and the supreme court of Missouri, in *Furrar v. Christy*, 24 Mo. 453, have decided that that destroys all estates tail.

I think it must be held as yet an open question, and a doubtful question, whether, under that will, the remainder in fee was vested in

Howard F. Christy, the surviving brother, or in the heirs general of William Christy deceased, or perhaps in the heirs general of defendant; nor do I think that the demurrer admits a clear legal title in complainant. Of course, it admits the truth of the facts well pleaded in the bill; but where the bill shows the source and nature of complainant's title, although containing an allegation that the complainant's title is clear and undisputed, the demurrer admits only the existence of such a title as the facts stated disclose; and the averment in the bill that the complainant has a clear, legal, and vested title will be treated as the mere statement of a conclusion of law.

The conclusions to which I have come in respect to this matter of the complainant's title simplify the further questions. In respect to those questions I will merely state, in a general way, a few propositions: *First*. Only upon an adjudicated or a clear title will a court of equity issue an injunction to restrain waste. Indeed, as a rule, equity looks to the law to establish the title before its interference is invoked. *Second*. A bill to remove a cloud upon title, as a general rule, will not be sustained where the alleged cloud is created simply by matter of record. Here, whatever of title complainant may have, as well as whatever adverse titles may exist, depend upon a construction of the will of William Christy, and nothing can be done by any party, or by lapse of time, to destroy any title which he may have. *Third*. The mere fact that a life-tenant is granting leases for terms extending beyond the duration of the life-estate is no basis for any action by the remainder-man. This was held by Judge TREAT on the demurrer to the original bill, and is unquestioned law. *Fourth*. For any mere slander of title the party has his remedy by an action at law for damages. *Fifth*. An action cannot be maintained in equity by a remainder-man against a life-tenant for the purpose of adjudicating the title of the former. The remedy is by an action at law, and should be against the other claimants of the remainder. *Walker v. Walker*, (Sup. Ct. N. H.) 22 Cent. Law J. 252. This is obviously proper, for the remainder-man does not hold under the life-tenant, and any decree against the life-tenant would be no adjudication as against any claimant of the remainder.

This very case in that which is alleged by the complainant in aggravation of his injuries illustrates the propriety of this rule. He says that he could have mortgaged his right for \$15,000 but for the clouds cast upon it by the action of the defendant. Now, in a controversy between himself and the defendant, no adjudication in his favor would establish his title or bar the heirs of William Christy upon the death of defendant from asserting their title; and if, after a decree were entered in his favor, some one should be induced thereby to loan money on his mortgage, and afterwards it should be held, in a controversy between the complainant and the heirs of William Christy, that theirs was the better title, could not the mortgagee fairly say that the unnecessary action of the court had misled



him into a loan without security? *Finally*, it is claimed that the bill must be sustained because a discovery is sought. I do not understand that a bill can be sustained solely for the sake of discovery; at least, that is the general rule. Indeed, bills of discovery are rarely, of late, resorted to. They have fallen (if I may be permitted to borrow a phrase from the political parlance of the day) into a condition of "innocuous desuetude."

In conclusion, let me say that, after a careful study of the bill, it seems to me more like an effort to establish a doubtful title than a proceeding to protect from serious wrong a clear or adjudicated title. I think, therefore, the demurrer must be sustained.

TREAT, J., (*orally*.) I did not sit in this case, but I very well remember Justice CATRON, Judge WELLS, and myself sat in the case in 1857 where the will of William Christy was considered in connection with the effect of the statute of 1825, reproduced in the statute of 1835, "docking tails," and familiarly known to the profession. This is no new doctrine. This court went over the whole ground at that time, and the then occupants of the bench reached the same conclusion to which Brother BREWER has come.

---

WILLIAMS, Receiver, etc., v. HINTERMEISTER.

(Circuit Court, W. D. Pennsylvania. 1886.)

1. CORPORATION—DISSOLUTION BY DECREE OF COURT—CONTEMPT OF OFFICER.

An officer of a corporation that has been dissolved by order of court cannot avoid the obligation to obey an injunction issued by such court by going into another state beyond the jurisdiction of the court.

2. SAME—FOREIGN CORPORATION—RIGHT TO CARRY ON BUSINESS—COMPLIANCE WITH STATE LAWS.

The constitution of the United States protects the commercial transactions of a corporation of another state against state legislation, imposing conditions upon the right to conduct such business.

3. SAME—STATE ALONE CAN OBJECT.

In a suit by the receiver of a foreign corporation against an officer thereof to reach its assets the defendant cannot allege its legal incapacity to transact business in the state where suit is brought, in the absence of complaint by the state itself of an infraction of its laws.

4. SAME—RECEIVER—APPOINTMENT OF ANCILLARY RECEIVER.

Where a receiver has been appointed by a state court, the court of another state may, when necessary, appoint an ancillary receiver in such state.

In Equity.

*G. Mortimer Lewis and J. H. McCreery*, for complainant.  
*Wadlinger & Bruce*, contra.

ACHESON, J. The defendant was a citizen of the state of New York, and a director of the Ithaca Organ & Piano Company, a cor-

poration of that state, when judicial proceedings were there instituted in the supreme court for the county of Tompkins against the corporation, and the present plaintiff was appointed its temporary receiver. By the admission of his answer filed here, on January 13, 1885, while still such director, the defendant was served with a copy of the order of the court appointing the plaintiff the temporary receiver of the corporation, which order (as is shown by the certified copy of the record now here exhibited) enjoined the directors of the company, and all persons having notice of the order, from interfering with the receiver in the discharge of his duties, and from collecting any of the debts or demands of the corporation, or disposing of or transferring any of its property, etc. The defendant could not avoid the effect of the subsequent decree in said cause made January 24, 1885, dissolving the corporation, and appointing the plaintiff the permanent receiver thereof, etc., by leaving the state of New York on January 17th and coming into the state of Pennsylvania, nor did he avoid the obligation to obey the injunction order by escaping from the jurisdiction of the supreme court of New York. *Bagby v. Railroad Co.*, 86 Pa. St. 291. That, in violation of the decrees of that tribunal, and to the frustration thereof, the defendant has been interfering with the assets of the corporation in the state of Pennsylvania, and attempting to possess himself thereof, and to appropriate them to himself, is quite plain from what is now shown. Nor is it a sufficient justification of the defendant's conduct that he himself is a creditor of this company. The corporation has been judicially found to be insolvent, and its assets have been sequestered for the benefit of all its creditors, and the corporation dissolved by decrees of a competent court, which, as we have seen, are binding upon the defendant. *Id.*

The defendant, indeed, sets up in his answer that the Ithaca Organ & Piano Company, being a foreign corporation, unlawfully carried on business in the state of Pennsylvania without complying with certain laws of the state, and it is claimed, therefore, that the court ought not to grant any equitable relief to the corporation or its receiver. I incline, however, to think that the transactions of the corporation referred to were strictly of a commercial nature, and within the protection of the constitution of the United States. *Cooper Manuf'g Co. v. Ferguson*, 113 U. S. 727; S. C. 5 Sup. Ct. Rep. 739. But, however this may be, I am unable to perceive how it lies in the defendant's mouth to allege the corporation's want of legal capacity to transact business in this state so long as the commonwealth is not complaining of any infraction of its laws. *Goundie v. Northampton Water Co.*, 7 Pa. St. 233. Moreover, this is not a suit by the corporation, or in its behalf; the suit in the state of New York was an adversary one against the corporation, and this is but an ancillary suit. It is a proceeding in behalf of the innocent creditors of the corporation and to reach its assets. The case is fairly within the

principle of the ruling in *Hagerman v. Empire State Co.*, 97 Pa. St. 534, that where a foreign corporation which has done business in the state of Pennsylvania is sued here it can not escape service of process, and defeat the action, by setting up its failure to comply with the laws requiring it to establish an office in the state, and appoint an agent upon whom service may be made, etc.

The pendency of the suit in Luzerne county set up in the answer is no bar to this suit, if for no other reason, because the present plaintiff is not a party thereto.

There is a large amount of the personal assets of this corporation within this state, and I think it sufficiently appears that a necessity exists for the appointment of a Pennsylvania receiver to collect and take charge of the same. Indeed, this court recently, in the case of *Filley v. Ithaca Organ & Piano Co.*, appointed a receiver. But the action of the court in that case has been called in question by the present defendant, who obtained a rule which is still pending to show cause why the order of appointment should not be revoked. It is thought to be desirable that the appointment be made in this case, the declared intention being to discontinue the other suit simultaneously with the making of a new order of appointment herein. To this course the court perceives no valid objection.

Let a decree be drawn appointing a receiver and enjoining the defendant, as prayed for.

---

### DE FRANCE and others v. JOHNSON.<sup>1</sup>

(Circuit Court, D. Minnesota. April, 1886.)

#### 1. HUSBAND AND WIFE—RIGHT OF SUPPOSED WIFE IN LAND.

A woman who innocently marries and cohabits with a man who has a wife living from whom he has never been legally divorced, cannot acquire an interest in his land by reason of such supposed marriage.

#### 2. SAME—MORTGAGE—WIFE FAILING TO ASSERT HER RIGHTS.

Where a wife has knowledge that her husband is living with another woman as his assumed wife, and takes no steps to assert her own rights, she cannot, as against a mortgagee, who has no notice of her relation to the mortgagor, to whom the husband executes a mortgage, after the death of the husband set up her right in the property as a wife.

#### 3. SAME—PURCHASE OF LAND WITH EARNINGS OF SUPPOSED WIFE—TRUST.

Where the title to government land is obtained by a man with means saved from her earnings by a woman who is living with him under the impression that she is his lawful wife, but who was never legally married to him, because he had a wife living from whom he had never been divorced, the land, after the death of the man, will not be considered as held in trust for such supposed wife as against his true wife.

In Equity.

<sup>1</sup>Reported by Robertson Howard, Esq., of the St. Paul bar.

*Mott & Gipson*, for complainants.

*Benton & Roberts*, for defendant.

NELSON, J. The defendant in this suit, in July, 1884, commenced, on the law side of the court, an action in ejectment to recover against the plaintiffs De France her rights under the law of the state of Minnesota as a lawful wife of Augustus Johnson to certain lands in Rice county, described as follows, viz., the S.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 22, and the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  section 27, township 109, range 21 W., containing 160 acres, of which the said Augustus Johnson was seized in his life-time. Guy De France and wife, Irena, admitted their possession of the land, but denied the right of the plaintiff to recover; and immediately, with Charles F. Tabor, who holds a mortgage on the land, brought this suit in equity to obtain an injunction perpetually restraining the further prosecution of the suit in ejectment, and for other relief. A temporary injunction *pendente lite* was allowed.

The defendant, Amanda M. Johnson, claims by virtue of the act relating to title to real property by descent. See Rev. St. Minn. 564. Section 2 of this act provides:

"The surviving wife shall be entitled to hold for the term of her natural life, free from all claims on account of the debts of the deceased, the homestead of such deceased, as such homestead is or may be defined in the statutes relating to homestead exemptions.

"Sec. 3. Such surviving wife shall also be entitled to, and shall hold in fee-simple, or by such inferior tenure as the deceased was at any time during coverture seized or possessed thereof, one equal undivided one-third of other lands of which the deceased was at any time during coverture seized or possessed, \* \* \* but subject in its just proportion with the other real estate to the payment of such debts of the deceased as are not paid from the personal estate."

The law relative to the homestead provides, (Rev. St. Minn. 767:)

"Sec. 1. That a homestead consisting of any quantity of land not exceeding 80 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, \* \* \* shall not be subject to an attachment, levy, or sale upon execution, or any other process issuing out of any court within this state. This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by the widow \* \* \* of any deceased person who was, when living, entitled to the benefits of this act."

"Sec. 2. Such exemption shall not extend to any mortgage thereon lawfully obtained; but such mortgage \* \* \* of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same, unless such mortgage shall be given to secure the payment of the purchase money, or some portion thereof."

The complainants in this equity suit claim relief for the following reasons: *First*, that Irena De France was the lawful wife of Augustus Johnson, to whom she was married October 20, 1835, at Detroit, and lived with him as his wife until his death,—until September, 1881; *second*, that the property was in the possession of Augustus Johnson at the time of his death, and was the result, mainly, of the

labor and economy of said Irena; *third*, that when Augustus entered the land in question in July, 1855, and obtained the title from the government, the land-warrant used in payment was purchased and paid for wholly or nearly so from the personal means and earnings of Irena after her marriage with Augustus, and that said Augustus attempted to enter the land in her name and take out the patent, but was prevented by the laws of the United States from so doing; and that after the issue of the patent he promised the said Irena to convey the same to her, and that she should thereafter hold the title in her own name, and in pursuance of said promise he deeded her the land on or about June 1, 1880; that on October 16, 1883, Irena and Guy J. De France, her present husband, mortgaged the land to Elizabeth L. Dobbin, for a loan of \$2,000, which mortgage is still subsisting, and has been duly assigned to Charles F. Tabor, the co-complainant in this suit, and that the money obtained from said mortgage was used for the purpose of paying the outstanding debts, including the farm, and to pay a prior mortgage on the land executed by Augustus and Irena in January, 1879; and that Irena had no knowledge that Augustus had a wife living, but in good faith lived with him supposing that she was his lawful wife.

To this bill in equity the defendant, Amanda Johnson, answered, alleging that she was married to Augustus on the tenth day of March, 1833, at St. Albans, Vermont; that she lived with him until May, 1835, when he left her to procure a home in the west, promising to return for her in a short time, and that she corresponded with him until the spring of 1838, and never has had any communication with him since.

Voluminous testimony is taken, and on due consideration I find the following facts: *First*. Amanda Johnson was born April 15, 1809, and married in March, 1833, at St. Albans, Vermont, to Augustus Johnson; that they cohabitated together until May, 1835, and had two children as the issue of said marriage, both adults now living; that in May, 1835, Johnson left her for the avowed purpose of looking up a Western home, and she never saw him afterwards; that he corresponded with her until the spring of 1838 from Cleveland, Ohio, but no letter ever passed between them afterwards; that in 1838 or 1839 she was informed that he was living with another woman claiming to be his wife, and about 1840 heard that they had gone to Indiana to live, and in 1860 that he was living in Minnesota about 30 miles from St. Paul,—she heard nothing further until after his death in September, 1881; and that he was never divorced from her.

The complainant Irena was born about the second of February, 1819, in Onondaga county, New York, and removed with her father's family to Michigan about the year 1828, and from thence with them to Cleveland, Ohio, about 1830; that in October, 1835, she was married to Augustus Johnson by a clergyman at Detroit, Michigan, to which place they went for that purpose from Cleveland; that

they returned to Cleveland, resided there until 1840, and from there went to Lancaster, Ohio, and then removed to Greene county, Indiana, where they resided until the summer of 1855, when they removed to Rice county, Minnesota, where the land in controversy was purchased from the government, upon which they lived until the death of Augustus in September, 1881, and upon which Irena and her present husband, Guy J. De France, still reside; that during the cohabitation of Augustus and Irena she bore him eleven children, of whom three are now living; that in 1882 Guy J. De France and Irena were married, and in 1883 mortgaged the lands to one Dobbin (who was in ignorance of the prior mortgage of Johnson) for the sum of \$2,000, and that this mortgage is now held by the complainant Tabor; the proceeds of the money obtained upon the mortgage went to take up a prior mortgage given by Augustus Johnson and Irena during his life-time, and to pay off the debts that had accrued in conducting the farm; that in June, 1880, Augustus Johnson lawfully conveyed all his right and title in the farm, through one Whipple, to Irena; that part of the money obtained to carry on the farm was the proceeds of the labor of Irena, supposing that she was the lawful wife of Augustus; that during the whole period of the relation between Augustus and Irena the latter was in entire ignorance of his prior marriage, or the existence of Amanda Maria Johnson.

Upon these facts the following conclusions are found: (1) Augustus and Irena were unable to contract marriage, and the second marriage is void absolutely, and not voidable; it did not make the woman a wife *de facto* until annulled. The statutes of Minnesota give no validity to the claim of Irena, although she was in ignorance of a former wife living. She is subject to the harsh rule which declares a second marriage *ipso facto* void, and denies to her any right in Johnson's estate. Amanda, the Vermont widow, and only legal wife, is not deprived of her statutory right of descent by the transfer of the lands to Mrs. Whipple, and under the statute she takes the homestead during life, and one undivided third of the other property in fee. The injustice of such a rule of the common law which subjects the innocent party to the harsh consequences of such a connection is well expressed by Mr. Scribner,—see 1 Scrib. Dower, (6th Ed.) 117:

"So far as the guilty party is concerned, it may be that these consequences furnish no ground of complaint against the law. Not, so, however, as to the party who unfortunately, as sometimes happens by artifice and deceit, has been entrapped into a forbidden connection. Where a pure-minded and virtuous female, innocent of all wrong, has been heartlessly deceived into an alliance sanctioned by all the formalities bestowed upon lawful wedlock, no good reason can be urged why, as some compensation for the cruel wrong inflicted upon her, she should not be entitled to all the rights and claims of a wife upon the estate of the guilty individual who has betrayed her confidence; and it is far from creditable to the civilization of the age that no step has been taken in that direction."

*Homestead of Augustus Johnson.* The statute confers upon the defendant a homestead right by virtue of marital relations existing at the time that Johnson, her husband, owned and occupied the land. It continued at the time of the transfer, and was consummated after his death, unless forfeited by improper conduct of the defendant which would estop her from asserting it now. No improper conduct is proved. The supreme court of this state (see *Holbrook v. Wightman*, 31 Minn. 168, S. C. 17 N. W. Rep. 280) has given a very liberal interpretation to this statute, and under that decision the defendant is entitled by descent to her homestead right which so much resembled dower.

*The Dobbin mortgage.* Is this mortgage a valid lien superior to the rights of the defendant? I think where the lawful wife, knowing the facts, allows another woman to appear as such, and occupy with her unfaithful husband a position which enabled them to deal with innocent third parties as husband and wife, such third parties will be protected. An equitable estoppel arises forbidding the lawful wife, after the death of her husband, to enforce an undisclosed claim in derogation of the innocently acquired contract rights. Johnson and Irena, during his life-time, had mortgaged the property to one Brown, and after his death and the subsequent marriage of Irena the latter mortgaged the property to Dobbin, who was in ignorance of Johnson's prior marriage, and out of the proceeds paid the amount that was due upon the previous mortgage, and such debts as had been contracted during the life-time of her supposed husband. In equity there can be no question that this money obtained by the Dobbin mortgage is a superior lien to all the rights of Amanda. As early as 1839 she was aware of the fact that he was living with another woman who claimed to be his wife, and as late as 1860 was informed that he was living in Minnesota with such relation existing. With full knowledge of this fact, she allowed such connection to remain without any attempt upon her part to enforce whatever rights she may have had as the lawful wife of said Augustus. In view of such a condition, she cannot now attempt to assert a claim superior to the rights of innocent parties under the relation as it was found by them. She, however, is entitled by the statute of the state, as against Irena De France, to all the rights which the law gives her; she must take them, however, subject to the mortgage which was executed to Dobbin.

The evidence is not sufficient to create a trust in favor of Irena under the statute of Minnesota. She lived with Augustus Johnson believing that he was her lawful husband, and any accumulation of money by her labor was made for the benefit of her supposed husband.

The life-estate in the homestead, according to the computation of the Northampton tables, on a valuation of \$1,750, which is one-half of the value of the 160 acres, and the age of the defendant at 77 years, is \$415.96. This is the purchase price, and on payment of

this amount the complainants De France can hold and occupy the homestead.

A decree will be entered declaring the mortgage held by Tabor a first lien on the whole 160 acres, and also granting to the complainants De France the right to occupy the homestead, and making the injunction permanent restraining the further prosecution of the action in ejectment on payment within 60 days after notice of this decision of the sum of \$415.96 above specified. On failure to pay this amount, the injunction is dissolved, and the only relief granted will be as above stated.

---

CENTRAL TRUST Co. and another *v.* WABASH, ST. L. & P. RY. CO.  
and others. (Dopp, Intervenor.)<sup>1</sup>

(Circuit Court, E. D. Missouri. March 24, 1886.)

**RAILROADS—NEGLIGENCE—USE OF TRACKS FOR FOOT-PATHS.**

Persons who use railroad tracks as foot-paths are bound to use reasonable care to avoid injury, and it is proper for locomotive engineers to act upon the presumption that they will use such care.<sup>2</sup>

In Equity. Exceptions to master's report.

The intervenor asks for damages for injuries sustained through the alleged negligence of the employes of the Wabash receivers. The facts of the case are substantially as follows: The intervenor, while walking westward along a track of the Wabash, St. Louis & Pacific Railway Company, saw a Wabash engine and tender backing towards him. When it was about two car lengths from him he left the Wabash track and got on the incoming Missouri Pacific track, which is just north of it, and started along the latter track; but, upon looking up, saw a Missouri Pacific train coming in, and to avoid it left the Missouri Pacific track and started back towards the Wabash track. Before he could reach the latter track he was struck by the tender of the Wabash engine and severely injured. There was not sufficient time after he started back towards the Wabash track to stop the engine before he was struck. By getting off the Missouri Pacific track on the north instead of the south side he could easily have avoided all danger. The master reports that the receivers' employes were not in fault, and that the intervenor is not entitled to recover.

Wm. C. & Jas. C. Jones, for intervenor.

H. S. Priest, for receivers.

TREAT, J., (*orally*.) The exceptions are overruled, not only for the reasons stated by the master, but from elemental rules in addition

<sup>1</sup>Reported by Benj. F. Rex, Esq., of the St. Louis bar.

<sup>2</sup>See note at end of case.



thereto there can be no recovery in this case. The intervenor chose to use the track of the railway company for his personal convenience, without regard to constantly moving trains thereon; and the railway company having a right to suppose the track free, pursued its ordinary course of business. The injury, therefore, occurred through the gross negligence of the intervenor, without any fault on the part of the railway company.

Master's report confirmed.

#### NOTE.

Where a party voluntarily goes upon and walks along a railroad track, and falls, without excuse, to look and listen for danger, and is injured by reason thereof from a passing train, he is guilty of such contributory negligence as will defeat recovery. *Laverenz v. Chicago, R. I. & P. R. Co.*, (Iowa,) 10 N. W. Rep. 268.

Such person is a mere trespasser, and while it would be the duty of the persons operating trains, if they saw him, and could avoid injuring him, to do so, yet if they did not see him, and were ignorant of his dangerous position, they would not be bound to look out to save him from injury. *McAllister v. Burlington & N. W. Ry. Co.*, (Iowa,) 20 N. W. Rep. 488.

A railroad company does not owe a mere trespasser upon its track the duty of having an engineer running a train to look to see whether he is there. *Scheffler v. Minneapolis & St. L. Ry. Co.*, (Minn.) 21 N. W. Rep. 711.

A person going upon a railroad track between stations, without first looking and listening for an approaching train, is guilty of contributory negligence, and cannot recover for injury sustained. *Ivens v. Cincinnati, W. & M. Ry. Co.*, (Ind.) 2 N. E. Rep. 134.

When a trespasser on a railway track is injured by the negligence of the railroad company, he may not recover unless such negligence was willful; mere gross negligence is not sufficient. *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286.

A person who, without right, and with full knowledge of the location, voluntarily places himself upon a railroad track, at a place where there is no crossing, and which is a known place of danger, and is killed by a passing train, is negligent, and no damages can be recovered for his death, except for wanton injury. *Pittsburgh, Ft. W. & C. Ry. Co. v. Collins*, 87 Pa. St. 405.

One who, without authority, enters upon a railway track, and while there becomes insensible from providential causes, and while in this state, and in plain view, is injured by a train, may recover damages of the company, although the injuries were not wanton or willful; but otherwise, if his insensibility was by reason of voluntary intoxication. *Houston & T. C. Ry. Co. v. Sympkins*, 54 Tex. 615.

Except at public crossings a railway company owes no duty to a young child on its track. *Cauley v. Pittsburgh, C. & St. L. Ry. Co.*, 95 Pa. St. 398. See *Meeks v. Southern Pac. Ry. Co.*, 56 Cal. 513; *Central Branch, etc., R. Co. v. Henigh*, 23 Kan. 347; *Hestonville P. R. Co. v. Connell*, 88 Pa. St. 520; *Moore v. Pennsylvania R. Co.*, 99 Pa. St. 301.

### CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co. and others. (NOONAN, Intervenor.)<sup>1</sup>

(Circuit Court, E. D. Missouri. March 24, 1886.)

#### RAILROADS—CONTRIBUTORY NEGLIGENCE—RIDING ON DEFECTIVE CAR.

The foreman of the crew of a switch-engine complained to the yard-master that one of the foot-boards of his engine was in a dangerous condition, but it was not repaired. Three days after making the complaint, and while riding on the defective foot-board, he was thrown off in consequence of the defect, and injured. He might have ridden on the caboose platform, which was safe. *Held*, that he had not been guilty of such contributory negligence as to prevent a recovery.

<sup>1</sup> Reported by Benj. F. Rex, Esq., of the St. Louis bar.  
v.26f.no.12—57

**In Equity. Exceptions to master's report.**

Petition for damages for injuries received by the intervenor in consequence, as alleged, of the negligence of the defendants. At the time of the accident in question the intervenor was the foreman of the night crew of a switch-engine used in the Moberly yards. On the morning of May 29, 1885, he got on the engine for the double purpose of informing the foreman of the day crew about the position of cars in the yard and of riding home. He took his position on the foot-board at the forward end of the car. This foot-board was suspended by four wrought-iron hangers or straps from a heavy piece of timber or cross-beam secured by bolts to the frame of the engine. This cross-beam had become loose, and when subjected to pressure would turn so as to swing the foot-board under its outer edge. When the pressure was removed it would spring back. It had been in this defective condition for several weeks, and several attempts had been made to fix it, but they had been unsuccessful. On the twenty-sixth of May the intervenor had told the yard-master that the step "was not fit for a man to work on,—was not safe," and had told him about it two or three times before. Nothing was done, however. This foot-board was adjacent to the platform of the caboose, and when the intervenor took his position on it as above stated he might, by a little exertion, have gotten on said platform, which was unoccupied. He did not do so, however, and the speed of the engine being suddenly increased, and the pressure on the cross-beam relieved, the foot-board suddenly sprang up, jerked the intervenor off, and threw him under the wheels of the caboose, which ran over one of his legs. The master reports that although there was great negligence in leaving the foot-board in its dangerous condition, yet the accident was directly contributed to by the intervenor in getting on the foot-board, which he knew to be unsafe, instead of climbing on the caboose platform.

*Dyer, Lee & Ellis*, for intervenor.

*Wills H. Blodgett* and *H. S. Priest*, for receivers.

TREAT, J., (*orally*.) In the light of the evidence, the construction by the master of the technical rules governing such causes is too narrow. The intervenor, an employe of the railway company, complained of the defective machinery, which it was the duty of the railway company to repair. In the hurry of business, in the discharge of his duties, and possibly for his personal convenience, he sought to use the machinery, which ought to have been perfect, to reach his home. The injury occurred by his using the defective step, concerning which he had theretofore complained. It seems to the court that the doctrine of contributory negligence under the facts proved would be pushed to an extreme if the railway company could, through its neglect of duty, after due notice, be relieved from its obligations to its employes because an employe who having repeatedly given notice to

the railway company, should, in the hurry of business, meet an accident resulting from such defective contrivance. It may be that, having complained of the defects, it would have been prudent on his part to observe whether the defects had been remedied; yet, in the conduct of business requiring rapid action with regard to incoming and outgoing trains, it becomes important that the employes should be prompt and efficient for the general conduct of the commerce of the country involved in rapid and safe transit. Railroad corporations ought not to be relieved from their obligations on which the safety of life and property depend, and on which the safety of employes also depend, by any strained or narrow rules. An employer and employe, each for the benefit of the other, and of the general public, should be held respectively to the obligations involved in the nature of the employment. Hence under the evidence presented, the exceptions by the intervenor must be sustained, and the case referred back to the master to determine the damages sustained by the intervenor.

---

BACHELOR v. KIRKBRIDE.

(Circuit Court, D. New Jersey. February 19, 1886.)

CONTRACT — WORK TO BE PAID FOR ON CERTIFICATE OF ARCHITECT — REFUSAL TO CERTIFY — RECOVERY OF QUANTUM MERUIT.

Where a contractor agrees to erect a building, to be paid for as the work progresses, on certificates signed by the supervising architect, and the architect fraudulently refuses to sign a certificate, and the contractor is unable to finish the building, he may recover of the owner on a *quantum meruit*, for the work actually done, although there was no collusion between the architect and such owner.<sup>1</sup>

On Motion for New Trial.

*S. H. Gray* and *A. C. Hartshorne*, for the rule.

*J. Frank Fort* and *A. Q. Keasbey*, *contra*.

NIXON, J. The case comes up on a rule to show cause why a new trial should not be granted. Several grounds are stated why the rule should be made absolute, but only one has suggested any serious question. The pleadings and evidence reveal the following state of facts: A contract was entered into between the plaintiff and the defendant for the construction of a hotel at Key East, on the New Jersey coast. By the terms of the agreement the builder was to be paid, during the progress of the work, the sum of \$40,000, as follows: On November 15, 1883, \$5,000; on December 15, 1883, \$10,000; on January 15, 1884, \$5,000; on February 15, 1884, \$5,000; on March 15, 1884, \$5,000; on May 15, 1884, \$5,000; on June 15,

<sup>1</sup>See note at end of case.

1884, the remaining \$5,000,—with the proviso added that, before each or any of said payments were made, the main building and other works of said building shall have sufficiently progressed to warrant such payment, the same to be decided by the architects, and their decision to be final on both parties. The first, second, and third payments, amounting to \$20,000 were duly made; but those of February 15th and March 15th were withheld, the architects refusing to give their certificate that the work or the building was sufficiently progressed to warrant the same. The contract also contained the provision that, "should the contractor, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract." In consequence of the refusal of the architects to give a certificate in the months of February and March, the contractor was compelled substantially to stop the work on the buildings for want of money to pay for the material and the wages of the workmen. The owner gave the three days' notice specified in the contract for him to go on, and, on his failing so to do, took the work in his own hands, furnished materials, provided workmen, and finished the building. This suit was brought by the contractor upon the *quantum meruit*, on the allegation and assumption that the owner had unlawfully terminated the contract, and that he was entitled to recover payment for the work which he had actually done. The jury gave a verdict for the plaintiff for the sum of \$13,168.54.

Under the charge of the learned circuit justice this verdict must be held to have established (1) that the work has sufficiently progressed in the months of February and March to entitle the plaintiff to the certificates; (2) that the architects fraudulently refused to give them; and (3) that the defendant failed to make the payments when the contractor demanded them, and was entitled to them under the contract, and wrongfully took the building out of his hands. The jury was advised by the court, on the trial, that unless these questions of fact were found for the plaintiff he could not recover in this action.

The counsel for the defendant, on the argument, insisted that a new trial should be granted, because there was no evidence of collusion between the owner and the architects; that no proof was offered that he induced them to withhold the certificates; and, even admitting that the architects acted fraudulently, the owner was not to be prejudiced by such action unless he was in some way a party to the fraud. The counsel for the plaintiff, on the other hand, contended that a fraudulent refusal of the architects to furnish a certificate, when the work was sufficiently progressed to call for one, whether in collusion with the owner or for any other cause not traceable to the influence and action of the contractor, justified the latter in not

going on with the work until paid; and when the owner, taking advantage of the fraudulent conduct of the architects, went into the possession of the unfinished building, and completed it, the contractor had a legal right to recover for the value of the work done up to the time when the owner took the charge and control.

We have thus presented for consideration an interesting, and, judging from the conflicting views in various cases which I have examined, I may add, unsettled, question, contracts of this character for the erection of buildings or the construction of other kinds of work are not common. As a rule, the owner has the means to pay, but wishes to guard against loss by paying no faster than the progress of the work warranted, and the contractor is dependent upon the moneys received during the progress of the building for the means of carrying the undertaking on to completion. A third party is therefore selected to determine when the payments ought to be made. In the present case the third party were the architects of the builder, and the contractor agreed to be bound by their judgment, not their *fraudulent* but *honest* judgment, in regard to the payment of the several installments provided for in the contract.

Evidence was offered tending or, at least, designed to show that during the progress of the work these architects complained to the contractor that they were not receiving enough money from the owner to pay them for superintending the buildings in their construction; that they had the opportunity, under the terms of the contract, to determine whether the work should cost him \$40,000 or \$60,000; and that it was to his interest, therefore, to pursue a liberal policy towards them if he wished them to decide any matters depending on their judgment in his favor. He naturally concluded, when the architects refused their certificates in the months of February and March, that they were not expressing their honest convictions, but were pursuing a course which they imagined would bring them compensation for changing their judgment. There is no pretense that the builder was in collusion with them. They were not acting to benefit him, but themselves. On the other hand, the testimony indicates that he was ready and willing to pay when the architects signed the certificates that the work was sufficiently advanced to render it safe for him to do so.

Whether the work had so far progressed as to entitle the contractor to have the certificates, and whether they were withheld for a fraudulent purpose, were questions of fact which the jury has determined in favor of the plaintiff, and I quite agree with the circuit justice in his charge that fraud by the arbiters, although not in collusion with the defendant, entitles the plaintiff to recover.

The only authority in direct conflict with this view is the statement of Addison in his valuable work on Contracts, p. \*396. In discussing the subject of actions for wrongfully withholding certificates, he says, (section 861:) "But the employer is not responsible for any

misconduct of his architects or surveyor in refusing to certify, not brought about by his instrumentality or interference." The only authority he quotes or reference he makes in support of the proposition is the case of *Clark v. Watson*, 18 C. B. (N. S.) 278; S. C. 34 Law J. C. P. 148; and I do not think it supports the broad text of the learned writer. The action was there brought on the contract, which made it a condition precedent to payment that the surveyor of the defendants should give a certificate of the work done. No certificate had been given. The declaration alleged "that the said surveyor had not granted such certificates, but had wrongfully and improperly neglected and refused to do so." The declaration was demurred to, and on the argument the case seems to have turned on the question whether the allegation that the certificate was wrongfully and improperly withheld necessarily implied that it was fraudulently withheld. In support of the demurrer the counsel of the defendants said that "no fraud or collusion was charged." It is not alleged that the conduct of the surveyor was fraudulent. The allegation that he wrongfully and improperly neglected and refused to grant his certificate would be satisfied by showing that he had been guilty of a mere error in judgment. The court took the same view of the case. *ERLE*, C. J., among other things, said:

"If the plaintiff had intended to rely on withholding the certificate as a wrongful act on the part of the defendant, he should have stated how it was wrongful. This is an attempt on the part of the plaintiff to take from the defendant the protection of his surveyor, and to substitute for it the opinion of a jury."

And *MILLES*, J., in assenting to the opinion of the chief justice, said: "Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error of judgment."

The motion for a new trial is overruled.

#### NOTE.

It is said in *Tetz v. Butterfield*, (Wis.) 11 N. W. Rep. 531, that where a building contract provides for the acceptance of the architect, evidence is admissible to show that he acted collusively and in bad faith.

In *Glacius v. Black*, 50 N. Y. 145, where, by the terms of a contract for repairing a building, it was provided that the materials to be furnished should be of the best quality, and the workmanship performed in the best manner, subject to the acceptance or rejection of the architect, and all to be in strict accordance with the plans and specifications, the work to be paid for "when completely done and accepted," it was held that the acceptance by the architect did not relieve the contractors from their agreement to perform the work according to the plans and specifications; nor did his acceptance of a different class of work, or inferior materials, from those contracted for, bind the owner to pay for them; that the provision for acceptance was merely an additional safeguard against defects not discernible by an unskilled person.

It is said in *Lynn v. Batimore & O. R. Co.*, 60 Md. 404, that on a contract by a corporation to purchase certain goods subject to inspection and approval by its agent, the corporation is liable if the agent fraudulently or in bad faith disapproves of the goods.

UNITED STATES v. BARLOW and another.<sup>1</sup>*(Circuit Court, D. Colorado. December 18, 1885.*

## POSTAL LAWS—ILLEGAL CONTRACT TO CARRY MAIL—RIGHT OF UNITED STATES TO RECOVER AMOUNT ILLEGALLY PAID.

Where an assistant postmaster general changes a mail route, and makes a contract which he has no authority to make, for a different route, and thereunder the contractor carries the mail at greater expense, and receives a greater compensation for such carriage than he was entitled to under the former contract, the United States cannot recover the amount illegally paid, in the absence of fraud in the procurement of the contract.<sup>2</sup>

At Law.

*H. W. Hobson*, U. S. Dist. Atty. Colo., and *Geo. L. Douglas*, for the United States.

*L. S. Dixon* and *Pitkin & Richmond*, for defendants.

**HALLETT, J.**, (*charging jury orally.*) This contract, gentlemen, is dated March 15, 1878, and provides for carrying the mail from Garland, by way of Fort Garland and other points, to Lake City, and thence, by way of Sherman, Burrows Park, Tellurium, and Animas Forks, to Ouray, and back, seven times a week, from the first day of July, 1878, to and including the thirtieth day of June, 1882, and the contractor, Mr. Vorhiss, was to receive \$19,000 for this service. This was at the rate, as stated by counsel, of \$96.39 per mile for the entire distance. The entire distance was 196 miles. There is a schedule attached to the contract in which the time is given. It was provided that mail should leave every day at 8 P. M., (leave Garland and arrive at Lake City in 27 hours,) and should be carried back from Lake City in the same time, and then it should leave Lake City at 1 A. M., daily, and arrive at Ouray in 30 hours, and be carried back in the same time.

Now, it is said, and the evidence tends to prove, that as to the part between Ouray and Lake City, it was found impracticable to carry the mail. In the summer time it could be carried with pack animals, but for several months,—the greater part of the year during the fall, winter, and spring—it could only be carried by men on snow-shoes, and perhaps not at all, part of the time. It may be said, upon the evidence, that it was ascertained that practically the contract could not be executed as to the part between Lake City and Ouray,—not in the time provided in this contract, of 30 hours, which was a rate of one and one-half miles per hour, about,—nor in any time,—it could not be done at all; so that, in the condition of things, we have a contract which was capable of being carried out as far as Lake City,—

<sup>1</sup>Reported by Robertson Howard, Esq., of the St. Paul bar.

<sup>2</sup>See *United States v. Cosgrove*, post, 908.

that is, between Garland and Lake City,—and incapable of execution between Lake City and Ouray.

Now, in that state of affairs, it seems, I may remark, that some of the people residing in Ouray, and elsewhere in that country, anxious to have a mail between Lake City and Ouray, applied to the department to have a change made in the route, so as to lay it upon an entirely different country,—an entirely different line. Instead of going over the mountain, a distance of 46 miles, they were to go around the greater part of the mountain, a distance of 110 miles. And in that petition and application, such as they were, the petitioners proceeded upon the hypothesis that the contract could not be carried out, in the way in which it was made, by carrying the mail by way of Mineral Point, over this great range of mountains;—it must be carried in some other way, if at all.

Now, in that condition of things, they applied to the department to make a change, and the officer of the department, who was an assistant postmaster general, I suppose, of some number,—whether first or second or third or fourth, I do not recall,—but he assumed to proceed under this section of the statute:

“Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the department, and no compensation shall be paid for any additional regular service rendered before the issuing of any such order.”

The language of that section is very general: “Compensation for additional service in carrying the mail shall not be in excess,” etc. It does not say what kind of service, or in what way it shall be additional to the service already rendered; but it is observed that, with reference to the matter which was presented for the consideration of the postmaster general, this was a service in substitution for something that could not be done. It may be said, in one sense, that it was additional to some service that the contractor was already rendering under this contract; but, in respect to the particular thing to be accomplished by it,—to get the mail from Lake City to Ouray,—it was in substitution for it,—it was an entirely new thing. But he proceeded under the authority of this statute, whatever it may be,—and assumed that he could select a new line not at all like the one which he was abandoning, and in which a service had been required at the rate of a mile and a half an hour; and it was his duty, under this statute, to require the same service upon this new route, although it was entirely different. The change was made expressly with a view to get a practicable route,—to abandon one that was impracticable, and to take one that would be practicable for wheeled vehicles. He assumed that he was to take the same time in carrying out this contract. In that he made a very great mistake. This statute authorized nothing of the kind. The time had been fixed with reference to



the route over this great mountain, which was probably known to be exceedingly difficult,—impossible during a considerable part of the year. The time had been fixed with reference to that; and to say that that should apply to another route,—an entirely new one, different as to every foot of the way,—there was not a single mile or yard of it that was the same as the route which was abandoned,—to say that that was to go upon the same time was mere assumption. Whether he was authorized to order these contractors, under this contract, to proceed according to the rate of speed upon this new route which had been fixed between Garland and Lake City, and which was about 5.92 miles per hour,—very nearly 6 miles,—150 miles in 27 hours,—is very doubtful; but, under the circumstances, that is all that can be claimed under this contract,—that he was authorized to proceed under this statute, and to require the service to be performed in the same way that it was performed upon the remainder of the route which was found to be practicable for wheeled vehicles; but, in view of the circumstances that it has been thought necessary in making this contract to divide the ground so as to get a very different rate of speed in one part,—the part lying between Lake City and Ouray,—from that which obtained between Garland and Lake City, it is very doubtful whether he could proceed at all, under this statute, or whether he could order the carriers to proceed from Lake City to Ouray by this new line at the same rate of speed which had been adopted from Garland to Lake City.

But I need not consider that. He did not do that, and what he did do he had no authority to do,—to make the rate of speed a mile and a half an hour, around from Lake City to Ouray, on this new route; and so, also, the increasing the speed upon the same basis was an act which he was not authorized to perform under the statute. Now, I must say to you, in addition to this, that my understanding is that under the law, and under the regulations of the department, all contracts for mail service are to be let upon general bidding, by advertisement for a certain time, in the papers, giving to all persons disposed to enter into such business an opportunity to bid for the contracts, and the contracts are let for four years, or something like that. The postmaster, when, for any reason, a contract becomes inoperative,—if the contractor fails to perform it, or any difficulty arises in respect to the execution of it,—he is authorized by the regulations to make a contract for temporary service. At the time this contract was made I believe that such contract was for a period of six months. He could make it for a period not exceeding six months. It seems that the time has been since extended to not exceeding one year, for which he may contract for temporary service. Aside from this temporary service, which is intended to fill a gap between the principal contracts, he must proceed according to law to advertise and let a contract by general bidding, by advertisement, and not otherwise. He has no authority to make a contract for a

long time, such as this was; and I have to say to you, upon the statute and the regulations that were in existence at the time, that, in my opinion, the postmaster general was not authorized to make this contract in respect to carrying the mail from Lake City to Ouray, in the way in which he did it. But it seems, from the testimony, that he made an agreement of this kind, and the parties went on and performed it, and have received money under it. Under such circumstances, although made without authority of law, and in excess of all provisions of the statute, and the regulations in respect to these matters, it is my judgment that the government cannot recover any part of the consideration which these defendants have received for carrying the mail, unless, in the making of this contract, there was fraud; and in the circumstances of the case, a fraud which was participated in; which was countenanced and recognized by the officer of the department,—the postmaster general, whether he was third, fourth, or fifth, or whatever his number may be,—and the defendants as well; and whether there was such fraud or not, is a question to be determined upon all the evidence before you.

It is stated by the defendants themselves that none of the parties who were making this contract knew anything at all as to the nature of the service to be performed, and nevertheless they set about making a statement that a certain force would be required to carry the mail over this new route; as, that if it were to go in 72 hours it would require 22 horses and 12 men, and if it was to go in 36 hours, as it was in fact carried, it would require 66 horses and 22 men. There is no proof that no such force as that was required, or, at least, not nearly so much. Now, upon the evidence which is before you as to the manner of computing the amount which was to be paid for carrying this mail, and the force to be used in respect to it, you are to say whether these parties, in making an agreement of this kind, contemplated a fraud upon the government; and by fraud I mean that there should be excessive pay for this service. It seems that the amount to be paid was \$26,658 per annum, and it was raised to this point upon some estimate. I don't know precisely how,—some estimate as to the cost of the service, which was based upon these figures, which were put into the office of the postmaster general by Mr. Sanderson, and apparently acted upon by him. In general, I suppose, over an ordinary road, it must be known by men in this business what force is required to carry a mail of ordinary weight in such a country as that; the number of horses, and what number of buck-boards or coaches; what number of men: in other words, the cost of carrying it, it seems to me, must be pretty clear to persons who are familiar with this service.

Now, if, upon all that took place then at the office of the postmaster general, you are of the opinion that these parties combined and agreed to raise the compensation to an extraordinary figure, with a view to benefit the defendants, knowing that the compensation was

excessive, then I think the government may sue for it, and recover it back. If they were acting honestly and fairly, and in the belief that they were dealing fairly with each other; that this was a reasonable compensation for the service to be performed,—there can be no recovery; and this without reference to what the service actually cost afterwards, and without reference to what the fact turned out to be with respect to the force required. The testimony as to the force actually used was given only to explain how the parties must have understood it at the time this contract was made; that is to say, persons familiar with this service,—the postmaster general himself, or the men in his office,—must have known something about what force was required to carry mail 110 miles, letting as many mail contracts as they do. Certainly the defendants knew all about it, and if they stated the force in excess of what the service actually required for the purpose of getting an extraordinary compensation, and there was an intention on their part at that time, and an intention on the part of the officer letting the contract, that they should have extraordinary compensation for this service, then the government may recover. That is the question for your consideration, gentlemen.

There are one or two instructions here, asked on behalf of the defendants, which I will give, as follows:

"Fraud, in transactions of this nature, is never presumed. The presumption of innocence prevails until the contrary is proved by fair and reasonable preponderance of the evidence.

"In such cases, also, the presumption is in favor of the innocence and integrity of the action of the public officers. The acts of the postmaster general and his assistants, coming within the scope of their powers, are presumed to be honest and fair until the contrary is established by a preponderance of proof."

In this case the presumption is the orders in question were honestly and properly made; that is not a subject which you are to consider. I advise you the postmaster general had no authority to make such orders as he did make; but as to the intention of the parties in the premises,—that of the defendants, also,—the presumption is that they were acting fairly and honestly, unless that be overcome by the evidence. If the circumstances are such as to convince you that they were not so acting, that there was an intention on the part of these parties to get an excessive price from the government for this service, and this was carried into the contract, then the plaintiff may recover, otherwise not.

UNITED STATES v. COSGROVE.<sup>1</sup>

(District Court, D. Kansas. 1886.)

## POSTAL LAW—MAIL CONTRACT—ILLEGAL PAYMENT OF COMPENSATION TO CONTRACTOR—RECOVERY BY UNITED STATES.

Where money has been paid to a mail contractor for services performed under orders of the postmaster general, expediting and increasing the service, and providing compensation therefor in violation of Rev. St. §§ 3960, 3961, it may be recovered in an action against the contractor, brought by the United States under Rev. St. § 4057.

At Law. Demurrer to declaration.

*W. C. Perry*, U. S. Atty., and *Geo. L. Douglass*, for plaintiff.

*John C. Tomlinson*, for defendant.

FOSTER, J. This action is brought by the United States to recover from the defendant a large sum of money, to-wit, \$140,000, alleged to have been paid him wrongfully and illegally, by order of the postmaster general, between October, 1878, and July, 1882, for carrying the mail on route No. 39,109, from Las Vegas to Las Cruces, New Mexico. The declaration contains three separate causes of action. The first charges that the defendant entered into a contract with the postmaster general for the United States, to carry the mail over said route three times a week, for the contract price of \$14,900 per year; that at different times in 1878 the postmaster general increased and expedited the service on said route, and made the following orders:

"1878, September 12, (7,772.) modified. Embrace Roswell on this route between Fort Sumner and Fort Stanton, from July 1, 1878. Distance and pay hereafter to be determined."

"1878, October 24, (9,444.) Modify order of September 12, 1878, (7,772.) so as to increase distance 62 miles; contractor's pay \$2,517.16 per annum, being *pro rata*."

"1878, October 29, (9,614.) Reduce schedule time from 180 hours to 120 hours, and allow contractor \$21,876.55 per annum additional pay, being *pro rata* from November 15, 1878. (2) Increase service four trips per week, and allow contractor \$52,120.96 per annum additional pay, being *pro rata* from November 15, 1878."

It is charged that the order of October 29th, making allowances for expedited service on said route, was based upon a sworn statement of the defendant, of which the following is a copy.

"WASHINGTON, D. C., October 23, 1878.

"*Hon. D. M. Key, P. M. General*—SIR: In order to reduce the running time on route 39,109, from Las Vegas to Las Cruces, New Mexico, from the present schedule of seven and one-half days to five days, as contemplated, I respectfully submit that to perform tri-weekly service upon this route upon the present schedule will require twelve carriers and thirty-six animals. To shorten the running time to five days' schedule will necessarily require nine

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.

additional carriers and fifty-two animals additional to increase said speed as desired. This to the best of my knowledge and belief.

[Signed.]

"CORNELIUS COSGROVE, Contractor.

"Acknowledged and sworn to before me, this twenty-third day of October, A. D. 1878.

JOHN W. CARSON, Notary Public."

It is further alleged that said statement was false and untrue in this: that it did not require the additional number of carriers or animals as therein stated, to perform the expedited service, but that in fact no additional carriers and no additional animals were either required or used by reason of the expedition of the schedule time; and by reason of said false allegations the postmaster general was misinformed and misled, and made such allowance under a mistake of fact; that said payments to the said defendant under the order during said time amounted to the sum of \$132,577.49.

The second count charges that the order of October 24, 1878, whereby said defendant was allowed an additional compensation of \$2,517.16 per annum for supplying the Roswell post-office was made by the postmaster general in the understanding and belief that said office was not in fact located on the line of the original route, but was at a distance, requiring 62 miles additional travel every trip; whereas, in fact, said office of Roswell was located directly on the line of the only practicable and regular traveled route between Fort Sumner and Fort Stanton, and was directly on the route selected and traveled by the defendant under his original contract, and no additional travel whatever was required to supply said office; that under the defendant's contract he was expressly bound to supply all offices thereafter to be established on the line of his route, without any additional compensation, and that said additional allowance was made by the postmaster general and paid the defendant under a misunderstanding of the facts in the case, and during said time there was paid the defendant, on account of said service, the sum of \$35,000.

The third count charges the defendant with the sum of \$800, being the amount paid the defendant on account of supplying the Roswell office from July 1 to October 24, 1878, the latter being the date when the order was made, and that all payments for services prior to the date of the order were retroactive, and in violation of section 3960 of the Revised Statutes of the United States.

The defendant interposes a general demurrer, that the allegations do not constitute a cause of action. It will be observed that the petition nowhere charges a willful or intentional misrepresentation of the facts on the part of the defendant, or any fraudulent intent on the part of either the defendant or the postmaster general in the transaction; and it is urged by defendant's counsel that such fraudulent intent is necessary to create a liability on the defendant; that the statement made by him being merely an expression of an opinion, and made without any bad faith, however erroneous it might

prove to be, would not make the defendant liable. On general principles, and in the absence of any statutory provision or contract obligation, this principle is amply sustained by an impregnable volume of American cases cited by defendant's counsel. *Stitt v. Little*, 63 N. Y. 427; *Arthur v. Griswold*, 55 N. Y. 405; *Mooney v. Miller*, 102 Mass. 217; *Wheeler v. Randall*, 48 Ill. 182; *Byard v. Holmes*, 34 N. J. Law, 296; *Hammatt v. Emerson*, 27 Me. 308. They proceed upon the theory that when the truth is as accessible to the one party as the other, and there is no bad faith nor a warranty, but merely the expression of a belief or an opinion, although erroneous and acted upon by the other party, there is no liability. The English cases are not so decided, but seem to permit a recovery where the payor has not been guilty of laches, but has used some degree of care to ascertain the truth. *Kelly v. Solari*, 9 Mees. & W. 57; *Bell v. Gardiner*, 4 Man. & G. 23; *Townsend v. Crowdy*, 8 C. B. 492. And again, there may be a liability for money had and received where it has been paid under a mistake of facts, either by the payor or a mutual mistake by both parties, as where a contractor was to be paid a stated price per yard for paving a street, and an error was made in the measurement of the work and the party was overpaid. *Neitzey v. U. S.*, 17 Ct. Cl. 127; *Sharkey v. Mansfield*, 90 N. Y. 227; *Wheadon v. Olds*, 20 Wend. 175. Where parties had mutual accounts between them, and one party, in making a statement of his account, by mistake omitted a charge of \$5,000, and thereby overpaid the other party, held, he might recover it back. *Lawrence v. American Nat. Bank*, 54 N. Y. 435; *National Bank v. Allen*, 59 Mo. 313.

In the case at bar there are several provisions in the acts of congress, as well as the contract between the parties, which have a very important bearing on the question at issue. Section 3960 of the Revised Statutes reads as follows:

"Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order."

Section 3961 provides as follows:

"No extra allowance shall be made for any increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

Section 4057 provides as follows:

"In all cases where money has been paid out of the funds of the post-office department, under the pretense that service has been performed therefor when in fact such service has not been performed, or as additional allowance for increased service actually rendered when the additional allowance exceeds

the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where the money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employe in the postal service, the postmaster general shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

One of the covenants in the contract, and covered by the compensation agreed on, binds the defendant as follows:

"*Third.* To take the mail and every part thereof from, and deliver it and every part thereof at, each post-office on the route, or *that may hereafter be established on the route.*"

The several provisions of the acts of congress are public laws, and are binding on the postmaster general and all parties contracting with him. They must take notice of the powers conferred on him, and the restrictions and limitations imposed. The law-making power may confer such authority and make such limitations on the public officers of the government as it deems proper, and a person entering into a contract with such officers must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law. *The Floyd Acceptances*, 7 Wall. 667-680; *Curtis v. U. S.*, 2 Ct. Cl. 152; *Steele v. U. S.*, 113 U. S. 128; S. C. 5 Sup. Ct. Rep. 396; *People v. Fields*, 58 N. Y. 505; *Supervisors, etc., v. Ellis*, 59 N. Y. 624. Admitting the facts as charged in this declaration to be true, does it set out transactions between the defendant and the postmaster general, and the payment of the public funds in pursuance thereof, unauthorized by law? It seems to me there can be but one answer to this question, and that in the affirmative. Section 3960 provides that "compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service. \* \* \* And no compensation shall be paid for any additional regular service rendered before the issuing of such order."

It is charged that the orders of the postmaster general for the additional service, and payments made defendant therefor, violated the provisions of this section: (1) That the compensation paid was in excess of the proportion which the original compensation bore to the original service; (2) that the compensation was paid defendant for services rendered before the issuing of the order to supply the Roswell office, to-wit, from July 1st to October 24th; (3) that additional compensation was paid defendant for services (supplying the Roswell office) which he was bound to perform, under his original contract, without extra compensation.

Section 3961 provides that "no extra allowance shall be made for any increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed

than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

It is charged that to perform the original service on the schedule of seven and one-half days it required twelve carriers and thirty-six animals, and to shorten the running time to five days the defendant certified it would necessarily require nine additional carriers and fifty-two additional animals; and on this basis the additional compensation was allowed and paid defendant, whereas, in fact, no additional carriers or animals whatever were required or used by reason of such expedited service. It seems hardly possible that so great a cutting down of time could be done without requiring additional carriers and animals, or putting a great deal of extra work on those already employed, but the court can only accept the averment as made in the declaration, and this certainly charges a direct violation of the statute; and whether the money was paid on an intentional or unintentional misrepresentation of facts, or no representation at all, or by mistake or fraud, matters not. The money was paid in violation of law and for services never performed.

The only question remaining to be answered is, can the United States maintain an action to recover it back? It seems to me the plain and unmistakable words of section 4057, before cited, answer this question fully and completely, and give such right of action. See, also, *Steele v. U. S.*, 113 U. S. 134; S. C. 5 Sup. Ct. Rep. 396.

In the case of *U. S. v. Parker*, tried in this court last June, Judge DUNDY, of Nebraska, took a similar view of the law as given in this opinion, while in the case of *U. S. v. Barlow*, ante, 903, tried in Colorado last December, Judge HALLETT took the opposite view. The amount in controversy in any of these actions is sufficient to entitle it to a review in the supreme court, where the law will be finally settled.

The demurrer must be overruled.

---

### RAHN v. SINGER MANUF'g Co.<sup>1</sup>

(Circuit Court, D. Minnesota. October Term, 1885.)

#### 1. MASTER AND SERVANT—RELATION—CONTRACT ESTABLISHING.

A contract was entered into between the defendant, a sewing-machine company, and one C., which was called a "canvasser's salary and commission contract." By it C. was to sell the machines of the defendant on a commission, receiving five dollars for every machine he sold, and, in addition, 10 per cent. of its gross price. The defendant undertook to furnish him a wagon, which he was to use exclusively in its business, and he himself was to provide a horse and harness. It was further stipulated in the contract that he should employ himself under the direction of the defendant, and under such

<sup>1</sup>Reported by Ambrose Tighe, Esq., of the St. Paul bar.



rules as it, or its managers at Minneapolis, should prescribe. *Held*, by the court, that under such a contract C. was not an independent contractor, but a servant of the defendant, and that the defendant was liable in damages for his torts committed while in the discharge of its business.

**2. SAME—LIABILITY OF MASTER FOR TORT OF SERVANT—SCOPE OF A SERVANT'S EMPLOYMENT—THE BURDEN AND NATURE OF THE PROOF.**

In order to fix the responsibility of the defendant, it is not necessary for the plaintiff to prove that the servant, for whose tort he seeks damages, was, at the time of the commission of the tort, engaged in executing specific commands of the defendant. It is enough for him to prove that the servant was acting within the general scope of his employment, but this much is necessary. If the usage of the parties, under the servant's contract of hiring, was of such a character that it allowed the servant to attend to his duties on such terms as suited his convenience, and at the time of the commission of the tort he was engaged in his own private business, but at the same time was pursuing the defendant's business in the service for which he was employed, the defendant would still be liable.

**3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**

It is not conclusive evidence of negligence on the plaintiff's part, in an action brought to recover damages for an injury sustained by being run over by the defendant's servant on a public street that at the time of the accident the plaintiff was crossing the street at a point not designated as a crossing; and this, too, although there were vehicles driving on the street and in sight. On the other hand, the plaintiff could not, without negligence, recklessly cross the street, nor take the chances of a nice calculation as to whether or not she could pass over with safety.

**4. SAME—NEGLIGENCE, WHEN QUESTION FOR JURY.**

It is a question for the jury to determine whether or not it is a negligent act for the driver of a vehicle to proceed at a reckless speed, at dusk, racing along a public street.

At Law.

*John W. Willis and C. A. Ebert, for plaintiff.*

*Mahoney & Donahue and J. N. Cross, for defendant.*

NELSON, J., (*charging jury*.) The plaintiff, a citizen of this state, residing in Minneapolis, brings this suit against the Singer Manufacturing Company, a corporation incorporated and organized under the laws of the state of New Jersey, to recover damages for personal injury, inflicted, as she alleges, through the negligence of the defendant. She asks to be compensated for injury which she has suffered at the hands of this defendant, through its negligence, as she alleges. Of course, you will see that the gist of the whole action is the negligence of the defendant, and the burden of proof is upon the plaintiff to show that the defendant committed the injury, through its negligence, upon the plaintiff.

The claim of the plaintiff is that she was crossing, on the tenth day of April, 1884, about twilight, between sundown and dark, Franklin avenue, in the city of Minneapolis, and while crossing was run down by a horse and wagon driven by one Corbitt. The wagon had upon it a Singer sewing-machine, screwed down to the box of the wagon. Now, before the plaintiff can recover against the defendant, she must show that Corbitt was a servant of this defendant, that is, that the relation of master and servant existed; that Corbitt was a person whose conduct was under the control of the defendant in the

particular business in which he was engaged. The general rule is that the master is answerable for the wrongful act of a servant committed in the course of the master's service, and this will apply to a corporation as well as to an individual. Corporations who are represented by and who operate through agents are not responsible for all wrongful acts committed by their agents or servants; but the wrongful act must be done when the agent or servant was employed in the actual service of the corporation or engaged exclusively for its benefit; so that, in this case, the principal question for the jury to consider is, was Corbitt, at the time that this plaintiff was run down on that street, in the service of the defendant? The usual test to determine whether the relation of master and servant existed, is whether the person who is charged to be the master had the right to direct the person's conduct and prescribe the mode of his action in doing the particular business; that is, to direct how the work should be done. If the person who is employed to do a particular work reserves to himself when and how the work is to be done, he may be an independent contractor; so that you are to determine—and that is the first question that presents itself here—whether the relation of master and servant existed between the defendant and Corbitt at the time this plaintiff was run down on that street; bearing in mind that the right to direct the person's conduct, and to prescribe how the work or business should be done, is the usual test to determine whether the relation of master and servant exists.

In this case there is a contract, which is before you,—a contract of employment, signed by the defendant and Corbitt, defining what his duties were, and how he was to work. It is called a "canvasser's salary and commission contract," and by its terms Corbitt was to receive five dollars for every machine that he sold, and, in addition to the five dollars, he was to receive a commission upon the price of the machine which he sold, as a "selling commission." He was to receive, in addition to the said five dollars, a further sum of 10 per cent. on the gross price realized for said sales so made. He received, not only the fixed sum of five dollars, but he was to receive a commission of 10 per cent. upon the gross sales. In the pursuit of his business, the defendant agreed to furnish him a wagon. This wagon belonged to the company or the corporation, and Corbitt was to furnish a horse and harness, to be used exclusively in the business of the defendant. A further significant provision in the contract is, Corbitt, or the second party, agrees to employ himself under the direction of the said Singer Manufacturing Company; thus coming within the very test which is given to determine whether the relation of master and servant exists in law, viz., the right to direct the person's conduct, and to prescribe the mode of doing the work. Then this was to be done under the directions of the Singer Sewing-machine Company, and "under such rules and instructions as it, or their managers at Minneapolis, shall prescribe;" so that, upon the

testimony as introduced here, it is sufficient for me to say that this paper alone, in my opinion, establishes the relation of servant and master between Corbitt and the defendant in this action.

There is no doubt but that this woman was hurt when she was run down. Was this injury inflicted through the negligence of Corbitt, upon Franklin avenue, as the woman was crossing it diagonally, not at the intersection of the crossing and the street, where the usual crossing is, but near the south side of Franklin avenue, which runs east and west? The plaintiff, as well as the defendant through its servants, had an equal right on Franklin avenue, but both were required to exercise the care and diligence which the circumstances demanded at that time. It was not unlawful for the plaintiff to cross Franklin avenue at a point not designated as a crossing. She was required, however, to exercise all the care and prudence necessary for her safety. She could not recklessly cross that street, and expose herself to the danger of being run over, nor could she take the chances of a nice calculation as to whether or not she could pass over that street with safety. The testimony shows that, at the time when she made an effort to cross that street, there was coming down from Ninth avenue, towards her, a horse and a top buggy; not the horse and wagon driven by Corbitt, but one which, from the point where she stood, was in front of the horse and wagon which was owned by the defendant. So that on that state of the case, as I said before, she testifying that she saw there were teams upon that street, must be prudent and act with diligence to avoid the danger to which she was exposed in crossing the street. The driver of the vehicle coming towards her was also required to be watchful and diligent, and could not drive through this street without exercising care and caution to avoid a collision with other vehicles or with pedestrians; and the care and caution required to be exercised by him must be reasonable, and such as the circumstances of the case at that time demanded. Of course, if the street had been crowded, the degree of care which he would be required to exercise would have been greater than when there were but a few vehicles upon the street and but few pedestrians; but he was required to be careful and cautious in not unnecessarily exposing to danger persons upon the street. If he was proceeding at a reckless speed, at dusk, racing, it is for you to determine whether that was not on his part a negligent act; whether by the speed, if it was a rapid speed, at which he was proceeding, whether it was not at a risk to persons who had an equal right to be upon the street with him. Now, it is for you to determine, upon all the evidence which has been introduced in regard to the manner in which Corbitt was proceeding upon that street, whether he was negligent at that time, or whether he was exercising all the care and caution that was necessary. If you should determine that there was no negligence, then, of course, there is an end of this case; for, if this injury was not brought about by negligence on the part of Corbitt, who was the servant of the de-

fendant, the plaintiff cannot recover. If, however, you should determine that Corbitt was negligent at that time, and that this injury was produced by that negligence, then you are to consider this next question: Whether, at the time the plaintiff was run down, Corbitt was about the defendant's business, acting within the scope of his employment; and that brings me to another branch of this case.

If you should find that Corbit was the servant of the defendant, it was not necessary for the plaintiff to prove that he had any specific directions from the defendant which required him to be upon this street at this particular time, but he must have been at that time acting within the scope of his employment, and about the business of the defendant. And if he was at that time acting within the general scope of his employment, and about the business of the defendant, and negligently at that time ran down the plaintiff, his negligence is imputable to the defendant. Upon that branch of the case the point to be determined by you is: "Was the injury inflicted by Corbitt's negligence incidental to the discharge of his duty as the defendant's servant?" If Corbitt had been attending to his own business, and was returning home from a private business trip, or a pleasure trip of his own, and was engaged in business outside of the range of his employment by the defendant, at the time the plaintiff was run down, then, although he was using the wagon at the time which he used when engaged in the performance of the defendant's business, the relation of master and servant did not so exist as to make the defendant liable. Corbitt must be shown to have been, at the time the plaintiff was run down, engaged in the business of the defendant. To illustrate, if a hired man, who is employed by a farmer to use his team to haul wood, while in the performance of such service, either going with an empty wagon or returning with a load of wood, negligently runs down on the highway a pedestrian, the employer is liable for the injury inflicted; that is, provided the person who was run down was not guilty of any contributory negligence. But if the hired man takes the same team, and deviates from the range of his employment to engage exclusively in his own private business, outside of the service required by reason of his engagement, and an injury is inflicted at that time, his employer, the farmer, is not responsible for the wrongs inflicted while the hired man was so using the team. On the other hand, if Corbitt was free to canvass and sell the defendant's machines on such terms as suited his own convenience, and had taken that trip to look after his own private business, and at the same time canvassed and sold the defendant's machines, the defendant is not necessarily exempt from liability. That is, if Corbitt combined his own business with that of the defendant, and was using the team not exclusively for his own ends, but at the same time was pursuing the defendant's business, in the service for which he was employed, then the defendant would be liable if an injury was the result of Corbitt's negligence.

Upon that branch of the case, you must determine upon all the evidence relating thereto, remembering that the burden of proof is upon the plaintiff to show that at the time of the injury Corbitt was acting within the scope of his employment. If you should determine all these questions in favor of the plaintiff,—that Corbitt was negligent at the time that this injury occurred; and that the injury was the result of his negligence; and, at the time plaintiff was run down, Corbitt was about the defendant's business, and within the scope of his employment,—then the plaintiff has proved her case, unless she was guilty of contributory negligence in crossing that street at that time; and this is a question for you to determine. It is a matter of defense, and the burden of proof in this case is shifted upon the defendant, and he must prove to your satisfaction, by the weight of evidence, that the plaintiff has been guilty of contributory negligence. In arriving at that, you must determine from all the evidence whether the danger in crossing the street at that time was so obvious and so apparent that none but a reckless person would have crossed. If you find that she did not exercise the care and caution called for at that time, and that she was guilty of contributory negligence, then she cannot recover. If, however, all the care was exercised by her which a prudent person would exercise under the circumstances, then she is not guilty of contributory negligence, and the defendant is answerable for the conduct of Corbitt.

If the plaintiff is entitled to recover in this case, the next question for you to determine is how much will compensate her for the injury inflicted. Upon that point, I cannot give you much assistance. It is a question for you to determine, upon all the evidence, as to what amount of money will compensate the plaintiff, under the circumstances, for the injury which was inflicted upon her. She is entitled, of course, to compensation for the pain and suffering accompanying the injury, and for all necessary expenses incurred in consequence of the injury, for nursing, attention of physicians, and loss of time, and she is also entitled to such a sum as, in your opinion, is just and proper, if this should be a permanent injury; and it is for you to determine whether, upon all the testimony in the case, these injuries are temporary or permanent. No malice has been shown, and therefore there cannot be any recovery upon the ground that it was a wanton or reckless running down of this plaintiff. If you should find from all the evidence in this case that the plaintiff is entitled to recover, your verdict must be for a fair and just compensation for the injuries inflicted.

The jury returned a verdict finding damages for the plaintiff in the sum of \$10,000. A motion for a new trial, made by the defendant, was denied, and verdict reduced to \$5,100, and writ of error granted.

# WHEELER v. MORRIS and others.<sup>1</sup>

(Circuit Court, D. Indiana. March 29, 1886.)

## 1. PATENTS FOR INVENTIONS—INFRINGEMENT—MACHINES FOR MAKING STOVE-PIPE ELBOWS.

The first, second, and sixth claims of letters patent No. 224,974, of February 24, 1880, to William A. Wheeler, for machines for making stove-pipe elbows, are infringed by a machine made in accordance with letters patent No. 234,191, of November 9, 1880, to John P. Ioor.

## 2. SAME—CONSTRUCTION OF CLAIM.

The third claim of the Wheeler patent was not infringed, because defendant used only three of the four elements of the combination; and the seventh claim was not infringed, because, if valid at all, it must be strictly construed and limited to the particular adjustment of parts described.

## 3. SAME—EQUIVALENTS.

Although the defendants did not use a toggle-joint mechanism, which was an element of the claims held infringed, the court finds that what they did use was an equivalent, which any skilled mechanic could have devised without the exercise of invention.

## In Equity.

*C. P. Jacobs*, for complainant.

*D. V. Burns and Sullivan & Jones*, for defendants.

WOODS, J. Action for infringement of the first, second, third, sixth, and seventh claims of letters patents No. 224,974, issued February 24, 1880, to the complainant, Wheeler, for improvements in machines for making stove-pipe elbows. These claims are as follows:

“(1) In a machine for forming circumferential crimps in the ends of sheet-metal pipes, an inside and a set of outside clamps, and a set of revolving formers, which are moved from and towards the central shaft by a toggle-joint mechanism, in combination with each other, substantially as specified. (2) In a crimping-machine, the combination of the toggle-joint, O, sliding blocks, G, and revolving formers, H, operating substantially as specified. (3) In a crimping-machine, the hollow revolving shaft, C, carrying the formers, and the central stationary rod or shaft, I, carrying the inside clamp, J, in combination with each other, substantially as specified.” “(6) In a crimping-machine, a set of formers, H, H, which revolve both upon their own axes and about the central shaft, and are expanded and contracted by a toggle-joint mechanism, all substantially as specified. (7) In a crimping-machine, a table, B, having a central orifice, of sufficient size to receive the end of the pipe, and also having under-side projections, b, b, to receive and support said pipe until clamped, in combination with a set of clamps, K, K, substantially as shown and specified.”

The defense is, in effect, a denial of infringement, it being especially alleged that the machine made and used by the defendants was constructed under and in accordance with letters patent No. 234,191, issued November 9, 1880, to the defendant John P. Ioor. The complainant's claims, it will be observed, are all for combinations,

<sup>1</sup> Reported by Charles C. Linthicum, Esq., of the Chicago bar.

and must be construed accordingly. The conclusion to which the court has arrived is that the defendants have infringed the first, second, and sixth claims, but not the third and seventh. The third claim is not infringed, because the defendants have used only three of the four elements of the combination; and the seventh, because, if patentable at all, it must be strictly construed, and limited to the particular adjustment of parts described. The defendants contend that they have not infringed the first, second, and sixth claims, because their machine does not have the toggle-joint mechanism embraced in each of those claims. But while this is so, I think the device which the defendants have substituted for the toggle-joint mechanism must be regarded as an equivalent, which any mechanic of skill and experience could have devised, without the aid of inventive power or genius.

The evidence does not show a license. Decree accordingly.

---

### THE GWALIA'S CARGO.<sup>1</sup>

(District Court, D. Massachusetts. March 3, 1886.)

#### CARRIERS OF GOODS BY VESSEL—DAMAGE TO CARGO WHILE UNLOADING—LEAKAGE OF BALLAST TANKS.

The cargo of a vessel was damaged during its discharge by water leaking from the ballast tanks into the hold. The tanks had been filled in order to steady the vessel. They had become strained during the passage, which was one of unusual severity. This circumstance was not known to the officers of the vessel, and there was a lack of proper care in filling them. The consignee, in consequence of the damage, refused to pay full freight. The carrier attached the cargo, claiming exemption from liability for damage caused by "perils of the sea." *Held*, that as the damage arose from negligence, it was unnecessary to consider the exemption claimed; that the circumstances demanded, on the part of the carrier, extreme care; and that as little or no care had been used, the damage sustained by the cargo should be deducted from the freight money.

In Admiralty.

*B. L. M. Tower*, for libelants.

*Frederick Dodge*, for claimants.

NELSON, J. This was a libel for freight against a cargo of sugar in hogsheads, brought to Boston from Cardenas and Caibarien, in Cuba, in the steam-ship *Gwalia*. The *Gwalia* was an English vessel, built of iron. She was constructed with water-tight bulk-heads, and with water ballast tanks extending the whole length of the ship fore and aft, except under the engine-room. The tops of the tanks were iron plates riveted to the sides of the ship. Resting on the

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

plates was a plank flooring, which formed the bottom of the lower hold. At the sides of the tanks were water-ways leading from forward and aft to a well below the engine-room. In the water-ways at the bulk-heads were sluices so arranged that they could be opened and closed from the engine room. The tanks were filled from the sea through an opening in the side of the ship, under the engine-room, and from this opening intermediate pipes led to the separate tanks, and the tanks could be filled altogether or separately. The ship arrived in Boston on April 7, 1884. The whole cargo consisted of 1698 hogsheads. On the evening of the 8th, 1606 hogsheads had been landed in good condition. The remaining 92 hogsheads formed the ground tier in the after-hold. The ship being lightened by the discharge of cargo, it became necessary to run up the ballast tanks to keep her steady, and prevent her from listing in the dock. The sea-cock was accordingly turned on, and the water was allowed to run into all the tanks simultaneously during the night. The next morning it was found that the tanks had filled, and that the water had leaked through the tops of two of them into the after-hold. The sluices in the water-ways at the bulk-heads having been kept shut, the water had accumulated in the hold, and risen above the dunnage, and flooded the sugar.

It was ascertained on subsequent examination that some of the rivets in the water-ways had become loosened, and the water had leaked into the hold through the rivet holes and seams. The tanks were sound at the commencement of the voyage, but had been strained in a storm of unusual severity which the ship had encountered off Cape Hatteras. The leak was unknown to the officers of the ship when the water was let into the tanks at Boston. The consignees paid all the freight money except \$1,975.67, and for this amount the owners of the *Gwalia* libeled the cargo. The consignees, who appeared as claimants, claimed a deduction of \$1,005.97, that being the amount of the damage to the cargo by the water. Both the charter-party and the bills of lading contained the usual exception exempting the ship from liability for damage arising from the perils of the sea. The claim of the owners was that the damage was caused by a peril of the sea, within the exceptions. Whether this would be the case if the ship had been free from fault, I have not found it necessary to consider. I think it is clear, upon the admitted facts, that those in charge of her were guilty of negligence. Their negligence consisted in allowing the water to run all night into the ballast tanks with the sluices at the bulk-heads closed. Had the sluices been open, the water would have run off into the well below the engine-room, and done no injury, or, at least, the presence of the leak would have been disclosed. As I understand the construction of the ship, as described in the depositions in the case, the water-ways and sluices were for the express purpose of draining off any water which might leak into the holds from the tanks when filled, and preventing just such acci-



dents as this. One excuse offered for the omission was that it was not usual on the *Gwalia* to open the sluices when the tanks were being filled. This, certainly, was not a justification, as it showed an habitual failure to use the means and appliances furnished by the ship to prevent damage to cargo by water. Another excuse is that the ship lay by the stern, and the water would not have run off if the sluices had been open. I doubt if this was so, in point of fact; but if it was, the difficulty could easily have been remedied by filling the forward tanks first.

The evidence showed that the weak point of vessels of this class was in the tops of the ballast tanks. In heavy weather, especially when supporting cargo, these are likely to become strained, thus starting the rivets and opening the seams between the iron plates. After the severe gale experienced during the voyage, it was the plain duty of the master to use extreme care in filling the tanks; and as he used no care at all, I must hold the ship responsible for his negligence. I am of opinion that the claimants are entitled to have deducted from the freight the damage to the cargo.

Decree for the libelants for \$969.70, with interest from the filing of the libel, without costs.

---

### THE GUILLERMO.<sup>1</sup>

#### POST v. THE GUILLERMO.

(*District Court, S. D. New York. March 11, 1886.*)

#### PERSONAL INJURY—OPEN HATCH—NARROW AND DARK PASSAGE—NEGLIGENCE.

Where libelant, who was acting as roundsman to see that the night inspectors were at their post, went aboard the ship *G.*, and fell across an open hatch of the ship, which led to the coal-bunkers, and which was in a comparatively narrow passage-way where it was perfectly dark, and for his injuries brought suit against the vessel, *held*, that such leaving of the hatchway open was negligence on the part of the ship, in respect to the libelant, whose duties called him there; but negligence of a minor character, which, under other circumstances of doubt, did not warrant the allowance to the libelant of more than his actual loss, which was fixed at \$400.

In Admiralty.

*Guy C. H. Corliss*, for libelant.

*Wheeler & Cortis*, for claimants.

BROWN, J. On the twenty-eighth day of September, 1885, the libelant was acting as roundsman, whose duty it was to see that the night-inspectors on board ship were at their posts. On visiting the *Guillermo*

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

during the evening, the night-inspector not answering to his call, the libelant went on board to find him. In passing along a covered passage-way that was quite dark, he stumbled upon the coamings of a hatch leading to the coal-bunkers, and fell across it upon his left side, breaking four ribs and fracturing the fifth, upon one side of the coamings, and suffering considerable injury to his head from striking the coamings on the other side. His left hand and arm, as he testified, went down the open hatch, touching nothing, and his right arm extending across one side of the coamings prevented his falling through. On the part of the vessel there is evidence that at 3 or 4 o'clock p. m. the hatch was covered. There was no further occasion for opening it, so far as known; and the claimants contend that it was closed and not open at the time of the accident. The coamings were about 18 inches high. Although it would be possible that the libelant's arm might have projected outside of the coamings and thus have seemed to him to go down the opening, his testimony is to the contrary, and the severe injuries received by him would, it seems to me, be much less likely to have arisen from a covered hatch, where the coamings were 18 inches above the deck, than from an open hatch. I must hold, therefore, to his account of the accident, although not without some doubt.

The libelant went upon the ship lawfully and in discharge of his duties. The open hatch was not in the situation of the ordinary open hatches for a discharge of cargo, such as may be expected to remain open in port, and which persons going upon the ship must avoid at their peril. This hatch was in a comparatively narrow passage-way along the side of the ship. To leave it open in a covered passage-way, which was perfectly dark, I must hold negligence in respect to the libelant, whose duties called him there. *The Helios*, 12 Fed. Rep. 732. The negligence, however, was of a minor character; and, under the various circumstances of doubt that attend the case, I do not feel warranted in allowing more than the actual loss to the libelant, which I fix at \$400.

A decree for that sum may be entered, with costs.

THE HENRY SUTTON.<sup>1</sup>

MANSON and others v. New York, N. H. &amp; H. R. Co.

(District Court, D. Connecticut. March 16, 1886.)

## 1. DEMURRAGE—PLACE OF DISCHARGE NAMED IN BILL OF LADING.

Under the bill of lading the vessel was obliged to discharge her cargo at the Consolidated docks, New Haven. As the company had several docks at New Haven, the consignee had the right to select therefrom the one that he preferred, provided that the dock selected was accessible in a reasonable time, by reasonable means.

## 2. SAME—DELAY CAUSED BY ACCIDENTS OF NAVIGATION.

Under a bill of lading which requires delivery to be made at a named dock, arrival of the vessel at the dock is ordinarily a prerequisite to demurrage, and delays of the vessel within the port, for a considerable time, from accidents of navigation, without the fault of the consignee, do not require him to receive the freight at another place than that named in the bill of lading.

## 3. SAME—RECIPROCAL RIGHTS OF MASTER AND CONSIGNEE.

When an accessible dock has been designated, it is the duty of the vessel to employ a tug, or to use such reasonable means as may be necessary to enable her to arrive at the place of discharge; but if a delay takes place at the request of the consignee, he takes upon himself the risks incident to change of weather, and is liable for demurrage if the discharge is not effected within the time stipulated for in the bill of lading, provided the designated dock has become inaccessible, unless by the use of unreasonable means, for an unreasonable time, and the vessel is prevented by the consignee from unloading at its accessible dock.

In Admiralty.

John H. Whiting and Wm. K. Townsend, for libelants.

Johnson T. Platt, for respondent.

SHIPMAN, J. This is a libel *in personam* for demurrage. On January 21, 1885, the West Virginia Central & Pittsburgh Railway Company shipped, at Baltimore, on board the schooner Henry Sutton, of which Gilbert Manson was master and managing owner, and the other libelants were co-owners, 980 tons of coal of 2,240 pounds each, to be delivered to the New York, New Haven & Hartford Railroad Company at the "Consolidated Road Docks," New Haven, for a specified freight. The said railroad company is very commonly called the "Consolidated Road."

The bill of lading contained the following provision in regard to demurrage:

"And 24 hours after the arrival at the above-named port and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted, for every hundred tons thereof, after which the cargo consignee or assignee shall pay demurrage at the rate of eight cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo, as per this bill of lading, for each and every day's detention, and *pro rata* for parts and portions of a day beyond the days above specified, until the cargo is fully discharged, which freight and demurrage shall constitute a lien upon said cargo."

<sup>1</sup> Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

The Henry Sutton reached Morris cove, within the entrance to New Haven harbor on Friday, January 30, 1885, at 12 o'clock midnight. On January 31, 1885, at 2 o'clock P. M., the captain reported to William A. Waterbury, who was then the freight agent of the consignee:

The consignee has three docks, Belle dock, the Middle dock, and the Pocket dock, close to each other, at which coal is delivered. Belle dock is the largest. These docks are near the steam-boat docks, where large steam-boats daily land, and are upon the main channel of the harbor.

The coal on board the Henry Sutton was bought for the use of the locomotive engines of the consignee. The largest part of this class of coal is received at the Shop dock, a small wharf south-west of the passenger depot, and connected with the main channel, three-fourths of a mile distant, by an artificial channel, which has been dug out within the last five or six years, and which is about 10 feet deep at low tide, and 80 feet wide. At this wharf are facilities for rapidly discharging a cargo by day and by night. One vessel only, at a time, can lie at the wharf and be discharged. Two vessels can lie at the same time in the basin. Another portion of the coal for the engines of the consignee is delivered at a dock above the draw-bridge. A portion of the same class of coal is delivered at Belle dock.

At this time, on January 31st, the consignee had three cargoes of this class of coal in the port; one, a small cargo, on board the George Aery, which reported on January 30th, and was then discharging at Belle dock; another, on board the Crescent, which reported on January 31st, at 11 o'clock A. M.; and the third, on board the Sutton. The Wm. O. Snow was then lying light at the Shop dock, having discharged her cargo.

At the conversation on January 31st said Waterbury told Capt. Manson that he must go to the Shop dock and discharge. The captain replied that he did not think the channel was deep enough for his vessel. Waterbury thought it was. The captain replied that he would try and take his vessel there on the first tide, which would be that night. Waterbury replied that he could not take her in then, as the Crescent was to go in first, and they did not want two there at once, as they had had some trouble with two vessels in the basin at the same time. This conversation was of such importance that I think it desirable to state the reasons for the finding that it took place. Manson testifies positively that he reported to Waterbury on the 31st, was assigned to the Shop dock, and was prohibited from going there then, and is supported by George Hills. The first conversation which Waterbury remembers he says took place on February 2d, when Manson apparently knew that he had been assigned to the Shop dock. It is manifest that he had been assigned there previously, and that he knew it. The only other person who could have made the assignment was the dock-master, who testifies that he took the bill of lading on the 31st, made

an entry of the time thereon, gave the captain no directions, and that his destination was apparently understood between him and Waterbury. The assignment must have been made by Waterbury on the 31st, who merely does not remember it. It is reasonable that the conversation which Manson and Hills narrate also took place at the same time.

The Wm. O. Snow came out and the Crescent went to the Shop dock on February 1st. On the same day, about 12 o'clock noon, the Sutton was towed to the entrance of the Shop dock channel. The tides were good, and she could have gone up to the Shop dock basin. On January 31st the ice was about an inch thick in the channel. On February 1st it was broken by rains. On February 2d, and thereafter it increased in thickness, and so continued until after February 15th, and a vessel could not get to the Shop dock unless a tug-boat should make a special trip and break the ice in advance. During the first week of February, Manson attempted to contract with the manager of one of the two principal tug-boat companies to tow him to the Shop dock, but was refused, because the manager did not think it safe either for the tug or tow to make the attempt. The Crescent tried to make a contract on February 6th with a tug-boat captain, to tow her out, but was unsuccessful. She remained at the wharf, frozen in, until March 6th. From January 31st to February 15th the Sutton could easily have gone to Belle dock as the main channel was kept open by the daily line of passenger steam-boats. The owners of tug-boats refused to take her to Belle dock, because Mr. Waterbury had requested them not to do so. Capt. Manson offered to go there and tender the cargo. Mr. Waterbury forbade his coming.

The Crescent was discharged at 2:20 A. M. on Thursday, February 5th. On February 4th Waterbury notified Manson that the Crescent would be discharged on the 5th, and that he should want the Sutton on that day. On February 5th Manson saw Waterbury and told him if the Crescent got out he would go in. Waterbury replied that when the Sutton got in he would have the Crescent out. The captain declined to go in until a passage was clear, and Waterbury declined to break the ice.

I make no finding in regard to a conversation which Mr. Waterbury and others say occurred on February 2d, which was to the effect that Manson asked for a berth at the Shop dock and Waterbury told him to go up the channel, and Manson declined to go till the Crescent was out of the way, because, in view of the conversation of January 31st forbidding Manson to go up the channel, and of the fact that on February 2d Waterbury knew that the ice prohibited the vessel from going up until it was broken, and of the further fact that the condition of the ice was about the same on February 2d as on February 5th, when the Sutton could not get to the wharf by the use of reasonable means, the conversation was not, in my opinion, of importance.

The Sutton lay at the mouth of the Shop dock channel until February 15th. Then an arrangement was made between the captain and consignee by which the cargo was delivered at Belle dock to Williams, Wells & Co., who paid the freight, and sold the coal; the captain retaining all his rights to claim demurrage, and no claim of either party being waived, relinquished, or admitted.

The vessel commenced discharging on February 16th, at 1 o'clock P. M., and was discharged on February 23d, about 9:15 A. M. If demurrage is to be allowed, it commenced on February 13th at 9:12 A. M., and is due for a period of 10 days, and amounts to \$784. Under the terms of the bill of lading the Sutton was obliged to discharge at that one of the docks of the consignee which the latter might designate, provided the designated dock was accessible by the use of reasonable means by the ship-owner and within a reasonable time. *Nelson v. Dahl*, 12 Ch. Div. 568. The selection of the place of discharge was with the consignee, and the ship-owner was obliged to use reasonable means to reach it, one of such means being the employment of a tug; but if, from physical or other causes, the place was inaccessible, unless by the use of unreasonable means or by waiting an unreasonable time, the consignee should have designated one of his wharves which was accessible and convenient for the discharge of the cargo. While this is true, it is also true that, under a bill of lading which requires delivery to be made at a named dock, arrival of the vessel at the dock is ordinarily a prerequisite to demurrage, and delays of the vessel within the port, for a considerable time, from accidents of navigation, without the fault of the consignee, do not require him to receive the freight at another place than that named in the bill of lading. *Aylward v. Smith*, 2 Low. 192; *Parker v. Winlow*, 7 El. & Bl. 942; *Bastifell v. Lloyd*, 1 Hurl. & C. 388; *Hodgdon v. Railroad Co.*, 46 Conn. 277.

At the time of the arrival of the Sutton, the Shop dock was designated, and was accessible by the aid of a tug, and could have been reached without difficulty. But the consignee requested that the vessel should not proceed to the dock, but should wait at the mouth of the channel, three-fourths of a mile distant. If she had voluntarily waited at this point, and had been frozen in, the case would present different features, but having waited there at the request of the consignee, and being unable, on the 5th, when she was notified that she would be wanted, to obtain a tug to break the ice, and being prevented by the express direction and authority of the consignee from unloading at its accessible dock, the liability of the consignee for demurrage seems to me to be complete. The accident of navigation which prevented the Sutton from reaching the Shop dock was encountered by the direction of the consignee. If that dock had been accessible by the use of reasonable means when the Crescent had unloaded, the case would have been different, but it was then inaccessible, unless by the use of unreasonable means, for an unreasonable time. The

Belle dock was accessible, but the consignee prevented the vessel from unloading there.

The facts in *Choate v. Meredith*, 1 Holmes, 500, bear an analogy to the facts here. In that case the consignee's wharf was inaccessible for an unduly long time by reason of ice and lack of sufficient water, whereupon the libellant took the vessel to the only accessible wharf in the port, notified the consignee, and offered to deliver the cargo, which offer was not accepted. The demurrage claimed was the same as in the bill of lading in this case. It was held that the libellant was entitled to demurrage.

There should be a decree in favor of the libellants for \$784, and interest from February 23, 1885, and costs.

---

### THE WIVANHOE.

#### UNION COTTON COMPRESS CO. OF GALVESTON v. THE WIVANHOE.

(District Court, E. D. Virginia. March 30, 1886.)

#### ADMIRALTY—JURISDICTION—CONTRACT TO COMPRESS CARGO AND PUT ON BOARD SHIP.

Where a compress company contracted with the master of a ship for compressing her cargo of cotton, and putting it on board, *held*, that this was a maritime contract within the admiralty jurisdiction, on which a libel *in rem* against the ship, wherever found, would lie.

In Admiralty. On a libel for compressing and delivering on board a cargo of cotton.

The cotton was compressed in Galveston, Texas, and put on board the steam-ship. The ship, bound to Liverpool, put into Norfolk to complete a supply of coal for the voyage. She was here libeled for the compress charges by instructions from the libellants, in Galveston. The libel set out, among other things, the following facts:

"On the fourteenth day of November, 1885, the said steam-ship, then lying at the port of Galveston, and requiring cargo of compressed cotton, at the special instance and request of her said master, R. D. Clark, employed and contracted with the libellants to compress her said cargo of cotton, to the amount and at the prices set forth in the schedule hereto annexed, which contains a just, true, and correct account of the work done and charges made for the same. And thereupon the libellants commenced, on the fourteenth day of November, 1885, and continued the work of compressing cotton for the said steam-ship Wivanhoe until the twenty-fourth day of December, 1885, when they completed the said work; and on the day last aforesaid had pressed and delivered to the said steam-ship 2,023 bales of cotton, and the same were received on board, and are now in said steam-ship as cargo."

The allegations of the libel were not denied, and the case was heard on the motion of the respondent to dismiss the proceeding on the ground that the contract of a compress company for compressing cotton is not within the admiralty jurisdiction, does not constitute a lien upon the vessel on which the cotton compressed is found as cargo, and cannot be made the subject of a libel *in rem* against the vessel.

*White & Garnett*, for libelant.

*Ellis & Kerr*, for respondent.

HUGHES, J. The question here is analogous to the much debated one, whether the contract of a stevedore is maritime, and will sustain a libel *in rem* against a ship. For some time it was held that a stevedore's contract for loading a vessel was not within the admiralty jurisdiction, though his contract for unloading it was. Opinion has undergone a change in this respect, and the tendency now is to hold a stevedore's contract to be within the admiralty and maritime jurisdiction. The question was discussed very fully by Judge LOWELL, who affirmed the jurisdiction, in the case of *The Geo. T. Kemp*, 2 Low. 482-485. It has more recently been considered by Judge DEADY in the case of *The Canada*, 7 Fed. Rep. 119, and the affirmative held, upon a strong array of reason and authority. See, also, *The Windermere*, 2 Fed. Rep. 722; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Velox*, 21 Fed. Rep. 479; *The Circassian*, 1 Ben. 209; *The Kate Tremaine*, 5 Ben. 60; *The Senator*, 21 Fed. Rep. 191; *The Emily Souder*, 17 Wall. 669. *Per contra*, see *The Bark Ilex*, 2 Woods, 229, and the cases there cited, viz.: *Cox v. Murray*, 1 Abb. Adm. 342; *McDermott v. The Owens*, 1 Wall. Jr. 371. See, also, *The E. A. Barnard*, 2 Fed. Rep. 712.

I see no reason why a stevedore's contract for loading, if made with the master of the vessel, is not to be deemed maritime. On the other hand, I can well perceive that if a stevedore makes a contract with one who wishes to ship merchandise on a vessel, to put the merchandise on board, both being landmen, and neither having any other mercantile relation to the vessel, I say I see no reason why such a contract should be held binding on the ship. But where the master himself employs the stevedore to put and stow his cargo on board, the contract seems to me to be as distinctly maritime as any other contract which the master may make with a landsman touching the vessel herself or her cargo.

The analogy of a contract for compressing the cotton constituting the cargo of a ship with the contract of a stevedore seems to be complete. In the case at bar, I infer from the language of the libel, which is given above, that the ship had engaged to carry certain 2,023 bales of cotton to Liverpool; that in the original form of the bales it was impracticable to stow such a number of them on board; that to meet this difficulty the ship herself employed the compress company to reduce the bales to convenient size for shipping, and to put them on board; and that the libelant faithfully executed this contract. In its mere statement, the case seems to me to be clearly within the admiralty jurisdiction, irrespectively of the circumstance whether the vessel was domestic, which she was not; or foreign, which she was.

I will decree for the libelant.